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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x3 ADIDAS AMERICA, INC., an
4 Oregon corporation;
4 and ADIDAS AG, a foreign entity,

5 Plaintiffs,

6 v.

6 21 Civ. 5615 (JSR)

7 THOM BROWNE, INC., a Delaware
8 corporation,9 Defendant.
9 -----x10 New York, N.Y.
11 January 12, 2023
12 9:35 a.m.

13 Before:

14 HON. JED S. RAKOFF,

15 District Judge

16 -and a Jury-

17 APPEARANCES

18 KILPATRICK TOWNSEND & STOCKTON LLP
19 Attorneys for Plaintiffs
20 BY: R. CHARLES HENN, JR.
21 H. FORREST FLEMMING III22 WOLF GREENFIELD & SACKS, PC
23 Attorneys for Defendant
24 BY: ROBERT MALDONADO
HARLEY LEWIN
BRYAN CONLEY
TONIA SAYOUR

25 ALSO PRESENT:

NITA GRAY, adidas paralegal
MICHAEL PUSTERLA, Thom Browne paralegal

N1CQadi1

1 (Trial continued; jury not present)

2 THE COURT: So the record should reflect that
3 yesterday my law clerk and I emailed the verdict form to the
4 parties, and plaintiffs had no objection. Defendants had an
5 objection for the record, as they stated, which was overruled.
6 So the verdict form will stand.

7 I understand that plaintiff has an objection to a
8 demonstrative in defendant's opening. We'll take that up at
9 the next break. And I think we're ready to proceed.

10 Bring in the jury.

11 (Jury present)

12 THE COURT: Good morning, ladies and gentlemen. You
13 are so lucky it's raining out, it's a nasty day, but you get to
14 listen to lawyers.

15 So let me remind you before we hear closing arguments
16 that nothing that counsel says is evidence. The evidence which
17 is fully before you now came from the witnesses and the
18 exhibits and there were a few stipulations. But it may be very
19 useful to hear what each side thinks the evidence shows. Of
20 course, they're going to disagree but they will be able to
21 bring to your attention arguments and inferences that you may
22 not have otherwise thought about, so it's useful to hear their
23 respective views of the evidence.

24 Plaintiff has what's called the burden of proof. I'll
25 explain that to you in my instructions later today, but the

N1CQadi1

Summation - Mr. Henn

1 result is that the plaintiff begins first, so we'll hear from
2 plaintiff's counsel.

3 MR. HENN: Good morning. Before we begin, I just
4 wanted to take a moment to thank all of you for the time and
5 attention that you have paid over the last ten days listening
6 to all of these witnesses, and, most of all, listening to the
7 lawyers droning on. I know it's hard. We know you will
8 continue to pay attention and to do your job, and both of us
9 thank you for that. So let's get started.

10 Every trademark case, just like this one, has three
11 parties who are interested: The plaintiff, here adidas, who
12 has spent 70 years developing a brand around three stripes; the
13 defendant, here Thom Browne, who added a stripe, or in the case
14 of the Grosgrain, took a stripe off and started selling
15 products that are basically the same; but there's a third party
16 in interest in this case that I want you to keep in mind as you
17 deliberate, and that is the public.

18 The purpose of trademark infringement, yes, it's to
19 protect adidas's trademark. Yes, it's to stop infringers from
20 doing conduct that's unlawful, but the most important thing is
21 preventing the public from being confused out in the
22 marketplace, outside the walls of the courtroom. Keep the
23 public in the back of your mind as you assess the evidence and
24 consider whether confusion is likely and whether Thom Browne
25 should be held liable.

N1CQadi1

Summation - Mr. Henn

1 We're going to talk a lot this morning about confusion
2 and the likelihood of confusion. As I explained to you at the
3 beginning during my opening statement, confusion and likelihood
4 of confusion can occur at three different points in time: One
5 is presale or initial interest confusion and you heard some
6 testimony about that. The next is point of sale; that's where
7 you're literally at the register buying the product and you
8 don't know what you're buying. The third is post sale; that's
9 after someone who knew what they were buying is wearing the
10 product, and is out in the public, and is seen by a member of
11 the public who is then confused about who put out that product.

12 And as we explained at the opening, and as we will say
13 throughout this closing, adidas is not alleging that someone
14 walks into Thom Browne's boutique and spends an hour with one
15 of their customer service people and spends \$3,000 on a
16 sweatsuit and walks out thinking they have adidas. That's not
17 what we are alleging. Our allegation is that in the real
18 world, there are circumstances presale and post sale where
19 confusion is likely.

20 I told you at the beginning the presales scenarios
21 where that can occur are where you're sitting on your couch
22 scrolling through social media and you see something that pops
23 up that has stripes on it, and you think, oh, that's a neat
24 adidas product. And you look more closely and you realize, oh,
25 wait, that's Thom Browne. In that moment you have experienced

N1CQadi1

Summation - Mr. Henn

1 presale confusion.

2 The other presale scenario for you to think about is
3 if you're walking through Nordstrom, a store where both adidas
4 and Thom Browne sell product, and you're walking through the
5 aisle, and you see a rack of striped clothes like you see
6 across the courtroom, and you see it from this distance. You
7 see those stripes, and the question is, are you likely to be
8 confused and think, oh, those might be adidas products? We'll
9 talk more about that later. But that's what presale likelihood
10 of confusion is.

11 Post sale likelihood of confusion is, again, a
12 situation where someone is wearing a Thom Browne outfit or,
13 more likely, is wearing one item of Thom Browne product outside
14 jogging through Central Park, walking down the street, and who
15 knows what else they have on. They might have adidas shoes on.
16 They might not. But the point is out in the world people have
17 become so accustomed to seeing adidas stripes that when they
18 see that, a substantial portion of the population is likely to
19 think, oh, that person is wearing adidas. That's likelihood of
20 post sale confusion.

21 Two things for you to think about before we go through
22 the evidence: First, adidas does not have to prove both
23 presale and post sale likelihood of confusion. Either one
24 suffices. So if you in your mind think the evidence shows only
25 presale confusion, Thom Browne is still liable. If you think

N1CQadi1

Summation - Mr. Henn

1 the evidence shows only post sale confusion or likelihood of
2 it, Thom Browne is still liable. It does not have to be both.

3 The other thing I want you to think about is, as the
4 Judge said, he's going to instruct you on the burden of proof.
5 This is not a criminal case. Adidas does not have to prove
6 anything beyond a reasonable doubt as you hear on *Law and*
7 *Order*. This is a case where the burden of proof is called the
8 preponderance of the evidence, which is essentially a fancy way
9 of saying when you consider all the evidence that both sides
10 presented and you put it on a scale, does it tip towards adidas
11 or does it tip towards Thom Browne. Any tip towards adidas,
12 that's liability. 50.1 percent is enough for liability in this
13 case. That's preponderance of the evidence.

14 So as you are listening to the closings and you're
15 considering the evidence, I want you to think, where does the
16 scale tip? Does it tip towards the possibility or the
17 likelihood that someone is going to be confused or does it
18 suggest, no, no one is going to be confused by this. All
19 right?

20 So, how do you go about considering whether there's a
21 likelihood of confusion? We talked about the factors at the
22 opening, and I've tried in my closing to organize the evidence
23 that you heard with regard to each of those factors to help you
24 process it in the way that makes sense. A note about the
25 factors. These factors are just things you can consider. They

N1CQadi1

Summation - Mr. Henn

1 are things that the Judge will tell you tend to suggest whether
2 there is a likelihood of confusion or there is not, but it is
3 not a list of requirements. It's not as though adidas has to
4 prove every single one of these factors. You might find some
5 favor Thom Browne. You might some favor adidas. But your job
6 is to decide overall which way does the scale tip, all right?

7 So what are those factors? How strong is the
8 Three-Stripe Mark? How similar are the parties' marks to one
9 another? Do the products compete for the same consumers? Is
10 there any evidence of actual confusion? Remember, this is a
11 case about likelihood of confusion so we don't have to show
12 that people were actually confused, but where there is evidence
13 of actual confusion, it's pretty good evidence that it's likely
14 since it actually occurred.

15 Next factor is quality of the products. Are they
16 similar? And if so, confusion is more likely. The degree of
17 care when consumers encounter the products. So in the presale
18 environment, how closely are people paying attention to tags,
19 prices and labels and how it was manufactured. And in the
20 post-sale environment, how careful is someone being about what
21 they're seeing running by them on the street? And the last is
22 bad faith. We'll talk about bad faith. Bad faith, I like to
23 tell my team as a plaintiff in a trademark case, it's a nice to
24 have but not a need to have. In other words, if you find that
25 Thom Browne acted in bad faith, that tends to show confusion is

N1CQadi1

Summation - Mr. Henn

1 likely because he was trying to do something that got closer
2 and closer to adidas, and that suggests a likelihood of
3 confusion. But if you find that there's no bad faith, that
4 doesn't mean confusion isn't likely. It just means he didn't
5 do it on purpose. Still liable, all right?

6 So let's talk about these factors. First, strength of
7 the mark. As we said at the beginning, adidas is known for
8 three stripes. It has been in the business of putting out
9 product with parallel stripes since the 1950s in this country,
10 and since Adi Dassler invented the idea of putting an exterior
11 brand on footwear so that people would know who put out that
12 product. It's kind of interesting you heard Mr. Browne say
13 that the reason he wanted to put stripes on his product is that
14 he learned from Ralph Lauren that you need an exterior badge to
15 signal where your product comes from. That's exactly what Adi
16 Dassler figured out in the 1940s, and when he began selling in
17 the United States in the 1950s, it had the Three-Stripe Mark,
18 and it's been on the products ever since.

19 The mark is covered by multiple federal trademark
20 registrations. The United States Patent and Trademark Office
21 has considered whether the Three-Stripe Mark is protectable
22 multiple times. You've seen on your screen one example. Every
23 one of these registrations is depicted in black and white. And
24 as Ms. Vanderhoff testified, when a registration is depicted in
25 black and white, it covers all color combinations. It's not

N1CQadi1

Summation - Mr. Henn

1 just restricted to black and white. It covers all color
2 combinations. It's registered on footwear multiple times and
3 in multiple places. It's registered on apparel in multiple
4 different placements covering a wide arrange of apparel,
5 jackets and sweatpants and shirts and shorts and pants and
6 track tops.

7 It is a federally registered mark. There is no doubt
8 that adidas owns the Three-Stripe Mark. The Three-Stripe Mark
9 is so integral to adidas and who it is and its DNA that when it
10 decided to adopt the trefoil logo in the 1970s, it says, you
11 know what, we're going to have three leaves and we're going to
12 run horizontally the Three-Stripe Mark across that trefoil and
13 it's going to be on every product we sell.

14 In the 1990s when they said, you know what, we want to
15 separate our Lifestyle product from our Performance product,
16 they said we need a new Performance logo, the Badge of Sports.
17 They took the Three-Stripe Mark, they angled it 30 degrees --
18 there's the three -- they cut the bottom off and they created
19 the Badge of Sport.

20 When they needed a corporate logo, they took the
21 Three-Stripe Mark and they ran it horizontally next to the word
22 adidas. Three stripes permeates adidas. It is one of the
23 strongest trademarks in the United States, particularly when it
24 comes to footwear and apparel. Everyone knows adidas when they
25 see that mark.

N1CQadi1

Summation - Mr. Henn

1 Now you're going to be able to consider various types
2 of evidence as to whether the mark is strong in addition to the
3 fact that it is registered. One is how long has adidas been
4 using it? Well, the evidence is uncontested, since 1952. No
5 challenge to that by Thom Browne.

6 Another type of evidence you can consider as to how
7 strong a mark is, is how much is this being advertised? Well,
8 you heard testimony from Chris Murphy about television
9 advertising, print advertising, online advertising, every
10 possible type of advertising you can think of to the tune of
11 \$300 million a year of advertising featuring the Three-Stripe
12 Mark.

13 Sales is another way you can decide if a mark is
14 strong because if products are selling well, that suggests the
15 branding on it is valuable to the consumers who are buying it.
16 \$3 billion a year adidas sells of just apparel and footwear
17 with three stripes on it in the United States. That is an
18 incredibly strong trademark.

19 And you might ask yourself, why is this a factor? Why
20 does strength of the mark matter in the likelihood of confusion
21 analysis? Well, the reason is when you have a really strong
22 trademark, when people see it and they immediately think of the
23 brand name, that means it's more likely when they see something
24 that's similar to trigger adidas in their minds because they've
25 been trained, since 1952 you've been trained when you see those

N1CQadi1

Summation - Mr. Henn

1 three parallel stripes, you think adidas. So when you see
2 something else, you're more likely to be confused. That's why
3 strength is an important a factor, and it's often why it's the
4 first factor.

5 Evidence of decades of use. Remember those old
6 categories people wearing 1970s clothes? We went through that
7 ad nauseam at the beginning of the trial. You probably thought
8 we would never stop showing you catalogs, but the reason we did
9 that was to show how strong the mark is and how long the mark
10 has been used and how long it has been known to consumers. It
11 was used back in the Seventies horizontally, vertically, on
12 shoes, on apparel, and in the red, blue, white combination.

13 We presented an exhibit that walked through horizontal
14 uses and some diagonal uses over decades. So it is not just
15 that the adidas Three-Stripe Mark exists in a vertical form.
16 It is used horizontally, vertically and diagonally, and it
17 conveys the same impression: When people see that three
18 stripes, whether it's down the sleeve or around the sleeve or
19 diagonally on a shoe, they know it's adidas.

20 Red, blue stripe use. You saw tons of evidence of
21 this as well. As we went through the decades of advertising
22 and catalogs, we highlighted for you the fact that adidas has
23 consistently used that combination over a long period of time.
24 We also went through iconic shoes in history. One of the
25 reasons the Three-Stripe Mark is so famous is because famous

N1CQadi1

Summation - Mr. Henn

1 athletes who have done incredible things did so wearing three
2 stripes. It dates back to the first track shoes, to cleats
3 that had screw-in -- the first soccer cleats that had screw-in
4 cleats. Muhammad Ali wearing three stripes in his world
5 championship bouts. Dick Fosbury, the high jumper, wearing it
6 when he jumped over the high jump. The pro model which tons of
7 ABA athletes wore in the 1970s with the red and blue stripes,
8 Billie Jean King's shoe. Shoes from, you know, Run-D.M.C.
9 wrote a whole song about "My Adidas" about the Superstar shoe
10 which had stripes on it.

11 As I mentioned, the evidence showed substantial sales
12 of Three-Stripe products to the tune of \$31 billion over the
13 last ten years, \$3.1 billion a year, tons of advertising of the
14 marketing of the three stripes and, by the way, advertising of
15 the three stripes not always in the traditional down-the-sleeve
16 pattern, but in all sorts of ways. You remember how Chris
17 Murphy walked you through those ads that we watched, the
18 television ads and the compilations that were on video, and he
19 showed you how thoughtful they are about making sure that the
20 camera zooms in on the stripes during the ad so that you know
21 the stripes are part of adidas's DNA.

22 We also presented substantial evidence of unsolicited
23 media attention. Reporters write articles about adidas, and
24 their editors say don't say adidas every time. Sometimes you
25 have to refer to them as something else or change it up a

N1CQadi1

Summation - Mr. Henn

1 little bit. So you've got references to adidas iconic three
2 stripes, the trademark Three-Stripe logo, the famous brand with
3 the three stripes. And I'll note that none of these modify
4 three stripes by saying, the famous vertical Three-Stripe logo.
5 They don't do that. It's three stripes no matter what the
6 orientation. The mark is clearly very strong. There's really
7 been no evidence to counter anything I just went through from
8 Thom Browne. That clearly weighs in adidas favor.

9 The second factor is how similar are the marks. And I
10 put this graphic up here because if similarity of the marks in
11 trademark infringement were simply a matter of counting
12 stripes, we wouldn't need a jury. We would just need a
13 calculator. We would look at it and say, oh, that's four,
14 that's three, they're not the same. But that's not how it
15 works. When you're considering the similarity of the marks,
16 your job is to consider how similar are they when they are
17 encountered by consumers in the marketplace. So when someone
18 is scrolling through social media on the couch, how similar is
19 it when they're going through when you've got four versus
20 three? When somebody runs by you in Central Park wearing some
21 of the compression tights that Thom Browne put out, how closely
22 are you counting stripes? And the fact is four and three are
23 very similar because, as we're going to discuss in a minute,
24 there's only one more of them from a distance, moving past,
25 scrolling past, they're very similar. You can look at these

N1CQadi1

Summation - Mr. Henn

1 images. The registered mark is on the left. Thom Browne's
2 product is on the right. Yes, there's a fourth stripe, but the
3 law does not require us to show that they're identical. The
4 Judge will tell you that similarity is the test, not identical.

5 The other thing is negative space. Do you remember
6 when I was cross-examining Thom Browne, and I pulled the
7 sweatpants up, and I asked him about negative space, and he
8 said, yes, it's the space between the stripes. This is one of
9 the reasons four stripes is a problem because when you add a
10 fourth stripe, you create the impression of three in between.
11 You see on your slide how that occurs. When Mr. Maldonado
12 stands up here in a few minutes with his Thom Browne tie, take
13 a look at that tie. Tell me do you always see four white
14 stripes or do you see three gray stripes between the white?
15 And you might be saying, oh, you're crazy, that's a stretch
16 man, that's a stretch. But then Ms. Arbuckle got up on the
17 stand, this person from Fashion Institute of Technology who
18 knows everything about fashion, and she was presented with this
19 jacket from Celine, and counsel for Thom Browne asked her how
20 many stripes do you see? Do you remember what she said? I was
21 looking at it, I was waiting for her to say three, you know,
22 three stripes. No, she looked at that, and she said, I see two
23 black stripes on a white background. She literally gave you on
24 the stand the evidence of how negative space can influence how
25 someone sees stripes. So think about that when you're thinking

N1CQadi1

Summation - Mr. Henn

1 about how similar these marks are.

2 The shoes are perhaps the closest example of how
3 similar what Thom Browne has done to the adidas marks. We
4 talked about the fact that this is not Thom Browne's Grosgrain.
5 He testified that that is not his Grosgrain. That was a design
6 choice that he made to create stripes. And it's convenient,
7 isn't it, that they're basically the same width as adidas
8 stripes. They are angled sideways just like adidas stripes.
9 They're in the exact position of adidas stripes on the shoe,
10 with regard to the red and blue ones. And with regard to the
11 white ones on the back, again, he said, "That's not my 4-Bars.
12 That's a design choice. I put the 4-Bars on the side of that
13 sneaker." Ask yourself why? Why do that? If your brand is
14 the little tag on the back. If it's the Grosgrain, white, red,
15 white, blue, white thing, why do that? And why put it on a
16 white shoe if you want people to know that it's white, red,
17 white, blue, white? Curious.

18 The other Grosgrain products are also incredibly
19 similar to the marks that are registered by adidas: Same
20 placement, same impression, shorts, pants, et cetera. So when
21 you are considering how similar the marks are, yes, one is
22 three, one is four, or one is three and one is two, but on
23 balance, in the context of presale and the context of post
24 sale, they are incredibly similar. Hence, likely confusion.

25 So the next one is do the products compete for the

N1CQadi1

Summation - Mr. Henn

1 same consumers? Well, there are a lot of different ways you
2 can look at this factor. The first is, are the parties selling
3 the same products? Well, there are different price points for
4 different products, for sure. But ask yourself, the last time
5 you were scrolling through Instagram, how many times did you
6 see a price tag on the products before you started clicking
7 through? Or when you were walking through the store and you
8 saw products hanging on a rack way over there, did you know
9 what the price was? No, you just knew that that was a cardigan
10 and a suit. So the product categories are the same, and why
11 that's relevant in this kind of case is when someone is running
12 by you in Central Park, and they're wearing 4-Bar compression
13 products, it is more likely that you will be confused if adidas
14 also sells compression products, right? You can consider if
15 adidas didn't sell any compression products, then it would be
16 very odd for you to see that and think adidas. But because
17 they sell exactly the same types of products, confusion is more
18 likely, and the record is very clear on this.

19 You probably are again wondering why it was taking so
20 long when we went through with Paul Bowyer, we went through
21 different categories. There are specific exhibits, an exhibit
22 of compression and running, an exhibit of sweatpants, an
23 exhibit of shorts, an exhibit of T-shirts, an exhibit of polo
24 shirts, sweat jackets and hoodies and outerwear and puffy
25 jackets and, of course, shoes. So the types of products that

N1CQadi1

Summation - Mr. Henn

1 are likely to be encountered in the marketplace are essentially
2 the same.

3 What about the other products? Thom Browne has spent
4 a lot of time during this trial putting in front of you
5 examples of products that adidas doesn't accuse of
6 infringement: Suits, the shrunken suit, cardigans, cashmere
7 sweaters. When you are back making your deliberations, focus
8 on what is actually being accused of infringement in this case.
9 It is not these products. It is the products that are exactly
10 the same kind that adidas sells. And adidas was thoughtful
11 about that. We did not say Thom Browne must stop all four
12 stripes on everything that it does. Because we are bound by
13 the law that says we can only object to things that are likely
14 to cause confusion. So we focused our claims on the products
15 in Exhibits 55 and 56. Those are the products that adidas
16 alleges to infringe. Not this other stuff. Not the stuff on
17 the runways.

18 How else do we know that these parties are competing
19 for the same consumers? One way we know is they're in the same
20 stores. Lots of testimony from both sides about the fact
21 they're in Saks, they're in Bergdorf, they're in Nordstrom's.
22 If you're walking through one of those stores, you are likely
23 to encounter both products at some point in your shopping trip,
24 and that increases the likelihood of confusion. Because if
25 you're walking through Nordstrom and you see stripes, do you

N1CQadi1

Summation - Mr. Henn

1 know if it's Thom Browne or adidas from a distance? Probably
2 not.

3 FARFETCH and Net-A-Porter. Those are online sites
4 where they also overlap. So if you are scrolling through What
5 FARFETCH has to offer, you might encounter both. Yes, once you
6 click through and you see at the top it says Thom Browne and
7 you see it's \$2,000 for something, yes, yes, you realize that
8 that's a Thom Browne product, but that's point-of-sale
9 confusion. You've already clicked through, and that is presale
10 confusion, and that is just as unlawful as what happens at the
11 register.

12 **We also know that presale confusion is possible**
13 **because both parties are very active on social media. You**
14 **heard testimony from Chris Murphy about this. You saw plenty**
15 **of examples with Rodrigo Bazan and Thom Browne where there were**
16 **Facebook posts and Instagram posts and that is exactly how it's**
17 **possible that people will scroll past these things in their**
18 **feed. You also heard about adidas doing paid advertising so**
19 **that even if you don't follow an adidas account, you are**
20 **exposed to those three stripes all the time.**

21 How else do we know they're pursuing the same types of
22 consumers? Well, we talked a lot about Leo Messi. You didn't
23 know him before; you now know who he is. He has been an adidas
24 athlete, as we know, for well over a decade. And Thom Browne
25 did a deal with them in 2018. We're going to talk about the

N1CQadi1

Summation - Mr. Henn

1 suspicious timing of that in a minute when we get to the bad
2 faith factor. But as we think about whether we are approaching
3 the same consumers, do you remember what Mr. Browne testified
4 on cross about this? His testimony was: I did that because I
5 wanted to reach customers that we hadn't reached before. I
6 wanted to reach a new type of consumer; not the niche
7 consumer -- you remember the exhibit where they said they were
8 a niche brand that was not known outside of their little area?
9 Part of that effort was to go out into the world of sports and
10 try and reach new people. Who were they trying to reach? They
11 were trying to reach consumers like adidas who are interested
12 in Lionel Messi and other soccer players. So, again, there was
13 lots of testimony from Chris Murphy and Paul Bowyer about how
14 focused adidas is in advertising, marketing and selling to
15 soccer fans. And Thom Browne didn't just do a one-time deal.
16 We saw the contract: Three-year deal with Barcelona,
17 conveniently after adidas objected to the use of the 4-Bars.

18 Basketball too. Lebron is a fan. Lebron wears Thom
19 Browne apparel. They went out in 2018 four months after adidas
20 objected, or a couple of months after adidas objected, and
21 outfitted the whole Cavaliers team. Well, why were they doing
22 that? Again, to reach new audiences with their product.
23 Basketball, where adidas has had a long-term presence and a
24 huge focus, you heard testimony from Chris Murphy and Paul
25 Bowyer about the importance of basketball as a category, the

N1CQadi1

Summation - Mr. Henn

1 importance of dressing athletes in three stripes, and you saw
2 tons of advertising like you see here on this slide. That's an
3 example of competing for the same consumer.

4 The next one is evidence of actual confusion. Now,
5 actual confusion, it's another one of those nice to have, not
6 need to have. The Judge is going to tell you that adidas has
7 no obligation to present you with evidence of actual confusion
8 because that's not the test. It's whether confusion is likely
9 to occur, not whether it has actually occurred. But in a case
10 where there is an actual confusion, that tells you it's likely.
11 So there are two categories of actual confusion evidence that
12 you heard in this case. One is consumers who in that presale
13 environment scrolling through their Instagram or feeds came
14 across a Thom Browne product. And, yes, one guy bothered to
15 literally type in "adidas" but think of all the people who saw
16 that and didn't think, oh, well, I should alert Thom Browne to
17 the fact that I think this is adidas and let me take a moment
18 and type adidas in there. This is the tip of the iceberg,
19 someone who took the time to express their confusion in
20 writing.

21 And think about how rare it would be for someone to
22 document actual confusion in the presale or post-sale
23 environment. You know if you're confused when you buy
24 something, you get home and you think, oh, my gosh, it's not
25 adidas. You return it to the store, and there's a very clear

N1CQadi1

Summation - Mr. Henn

1 documentation, I was confused, hence, I returned it. But in
2 the presale and post-sale environment, it's very difficult to
3 find actual confusion. There's not a 1-800 I was confused and
4 you dial in and you say, "I saw Thom Browne and I was
5 confused." But here, we actually have people who took the time
6 to express their confusion. In Instagram posts both with
7 regard to the 4-Bars and with regard to the Grosgrain, "I
8 thought it was adidas." Even using @adidas, tagging the
9 company.

10 The other evidence of actual confusion in this case is
11 the survey. So you're sitting there thinking, all right, I'm a
12 juror, I've got to decide all of this evidence. What is the
13 best evidence of what consumers think when they see these
14 products? The best evidence is a study that shows the products
15 to consumers and asks, what do you think? Who puts this out?
16 Well, Hal Poret conducted a survey of 2,400 people, men and
17 women across the United States, people who were likely to buy
18 these types of products, so the very consumers that you are
19 supposed to be assessing whether there's a likelihood of
20 confusion for.

21 He asked them two key questions. The first was what
22 company or brand do you believe makes or puts out this product?
23 Makes or puts out. That is an assessment of are people
24 confused about the source of these products. Do you think
25 adidas actually made this product? He also asked do you think

N1CQadi1

Summation - Mr. Henn

1 the product we showed you is affiliated with, sponsored or
2 approved by adidas? And when the Judge gives you the
3 instructions later, you will see that that is important
4 evidence. If, in fact, consumers are likely to believe that
5 the product is affiliated with, sponsored by, or approved by
6 adidas, Thom Browne is liable. Hal Poret asked the same
7 questions that you are being asked to resolve.

8 And what were the results? The results were
9 significant, as Mr. Poret told you. You might look at this and
10 say, well, 26 percent of people were confused. What about the
11 other 74 percent? Yes, we're not saying everyone in America is
12 going to be confused. But think about 26 percent of the
13 population and what that number looks like. 26 percent of
14 people in New York walking down the street. 26 percent of
15 people thinking that that is adidas. And, keep in mind, that's
16 after controlling for the noise created by just these look like
17 athletic products. The control caught that. So we know the
18 only difference in these images is Thom Browne's use of the
19 4-Bar mark. And 26 percent of people seeing the jacket, and
20 the compression pants were confused. 38.6 percent were
21 confused by that top. Almost 25 percent were confused by the
22 running shorts and the jacket. This is empirical data that you
23 have to base your decision on. With regard to men's product,
24 35 percent were confused by the T-shirt and the gray
25 sweatpants. 31 percent by the shorts. 30 percent by the

N1CQadi1

Summation - Mr. Henn

1 jacket. 15 percent by the sweatpants by themselves. And the
2 shoes 14 percent.

3 Mr. Poret gave you quantitative proven data that the
4 consumers at issue are confused. What did Thom Browne give you
5 in response? Nothing. Nothing. There is not a survey from
6 Thom Browne in this case. There is no one who came and sat in
7 that chair and said, I did a study, and guess what? Confusion
8 is not likely. Just an empty chair. No response to Hal
9 Poret's survey.

10 Now, they brought Dr. Steckel in. He's a great guy,
11 but he didn't offer any opinions regarding Hal Poret's survey
12 or any other matter in the case for that matter, but he did not
13 respond to Hal Poret's survey. We have no response in the
14 record, so when you are weighing the evidence, there is nothing
15 to counterbalance that in the record.

16 What do we have? We have the cross-examination of
17 Mr. Poret. And what did the cross-examination focus on? It
18 was, well, Mr. Poret, you used pictures with a white
19 background. Okay. Let's just pause and think about that for a
20 minute. First of all, he testified the reason he did that was
21 so that consumers would focus on the product, so they had every
22 opportunity to see the stripes, count the stripes without any
23 distractions that would actually exist in the world real. The
24 second thing he said is putting a tree in the background or a
25 bus in the background does not reduce the level of confusion.

N1CQadi1

Summation - Mr. Henn

1 If anything, that would mean people are paying less attention
2 to the clothing because they're distracted by everything else
3 going on around them. Confusion goes up. The third thing he
4 said about that criticism was perhaps important from a science
5 standpoint, he said adidas is not alleging that trees are like
6 likely to cause confusion. So I would have had to put that in
7 the background of the control as well. So it would have netted
8 out. So by using the white background, he ensured the most
9 valid result. And overall 26.9 percent of the public is
10 confused by Thom Browne's products. Remember, the third party
11 in interest in this case. It's these people, the public.

12 The next factor is quality of the parties' products.
13 First of all, both parties sell perfectly high-quality goods.
14 Not only did you hear testimony from adidas from Paul Bowyer
15 about the controls at the factory and the wear testing and the
16 performance testing and all the things adidas goes through to
17 make sure its products are the highest quality and actually
18 help perform on court or on the field, but you also heard
19 testimony about these collaborations where adidas does these
20 high-end collaborations with Yohji Yamamoto and Stella
21 McCartney, Danielle Cathari and Prada and Gucci. So to the
22 extent you had some concern about the fact that Thom Browne's
23 products are made in Italy from the finest fabrics and are
24 woven in a very special way, the quality is essentially the
25 same.

N1CQadi1

Summation - Mr. Henn

1 The other thing to think about while you're assessing
2 quality is context. Remember, if you were buying one of these
3 things, you might pick them up and check the manufacturer, you
4 might check price, you might see how it's woven and what the
5 fabric is. If you're in the presale context, you're too far
6 away to touch the product, to know how it's manufactured, to
7 know what it's made of. And in the post-sale scenario, unless
8 you are a really creepy person, if you see somebody on the
9 subway, you're not going to know what the fabric feels like or
10 what it's made of because you're not going to go over and start
11 touching the person. So you will need to assess quality in the
12 context in which you are assessing likelihood of confusion.
13 And so visually the quality is essentially the same.

14 A moment about the rack, the rack that's been sitting
15 over there for you to look at. A couple things for you to
16 think about the rack: First, can you tell the price of
17 anything on that rack? Nope. In fact, do you remember when
18 counsel took one of the products up to Thom Browne and asked
19 him what the price was, and he started looking all over for a
20 price tag and couldn't find a price tag, and said, oh, it's
21 about a thousand bucks? He couldn't tell the price holding his
22 own product. Ask yourself in the post-sale scenario, do you
23 know what the price of these products are? Fabric? This one is
24 made of cashmere, so of course it's totally different from
25 adidas and no one would know. You can't tell that's cashmere

N1CQadi1

Summation - Mr. Henn

1 from over here. Who knows what those are made of?

2 How they are manufactured. Are the stripes woven in
3 or stitched on? Really? Is that what people are focused on
4 when they're seeing people walk by them? Or when you're
5 looking across there, can you really tell how those are woven
6 into the product? You are looking at product in the exact kind
7 of way that someone in the presale or post-sale environment
8 would -- from a distance. You also can't, by the way, read the
9 little labels and see that in tiny, tiny print it says "Thom
10 Browne." So that's not helping anyone avoid confusion.

11 So what was on that rack? This is a good example
12 where they filled this rack with a bunch of products adidas is
13 not alleging infringed its mark because the products are so
14 different. Adidas is limiting its claims to things that look
15 like adidas products: Sweatpants, hoodies, sweatshirts, right?
16 Take everything off the rack that we're not accusing, and it's
17 a skinny, little rack.

18 The other thing to think about, what's not on that
19 rack? What did Thom Browne not want you to look at in this
20 courtroom? There is not one piece of their running compression
21 apparel on that rack. There is not a single shoe over there.
22 You think that was by accident? They didn't want you to see
23 that stuff from this kind of distance because they knew the
24 impact would be, oh, my gosh, from over there, that looks like
25 adidas.

N1CQadi1

Summation - Mr. Henn

1 The other thing I want to say about quality, Thom
2 Browne clearly makes very expensive clothes, and they are --
3 you know, reminds me of the old ads of Corinthian leather, but
4 they are products made with the finest cashmere from Corgi and
5 Wales. We are not disputing that, but, very interestingly, the
6 products we actually accuse are the products that Thom Browne
7 calls things like running shoes, and tech compression tights.
8 And when we asked, are these actual running shoes? It might
9 have been my favorite line in the whole trial. Thom Browne
10 said, "I would advise not running in my running shoes." Think
11 about that for a minute. "I would advise not running in my
12 running shoes."

13 And when asked whether they did any product testing or
14 wear testing on these purported running outfits, the answer
15 was, oh, no, no, no, no. And when we asked about their
16 swimwear, do you remember that one? Are these actually for
17 swimming? The answer: Well, you can swim in it. Reminds me
18 of going to a wedding, getting dunked in a pool. You can get
19 wet in these things, but they are not made for this purpose.

20 The next factor, the degree of care when you are
21 encountering the product. I've covered this a little bit as
22 I've talked about the other factors because, again, as you
23 assess the evidence, on each of these you need to be very
24 cognizant where in that purchase journey the likelihood of
25 confusion is happening. When you think about the degree of

N1CQadi1

Summation - Mr. Henn

1 care that consumers are exercising, be thinking about the two
2 places that adidas is alleging likelihood of confusion:
3 Presale and post sale.

4 So what is some evidence that is not relevant to your
5 consideration? Price. Presale. Post sale. Nobody knows the
6 price. Fabric. Presale. Post sale. You don't know the
7 fabric. You don't know the manufacturing. You don't have
8 someone giving you careful client care and sitting with you and
9 serving you tea and all of the things that happened in the
10 store. None of that is relevant. With regard to where we are
11 alleging likelihood of confusion and where you need to assess
12 is confusion likely, the degree of care is way less. It's just
13 the nature of life. When you walk from the car or the subway
14 or from your place to the court, you are not sitting there
15 touching the people that walk by and asking them what it cost
16 and where it was manufactured. That's just not the way things
17 happen in the post-sale world.

18 Why is the degree of care such an important issue for
19 you in this case? Well, it's because once the products leave
20 Thom Browne's store, the consumer can wear it however they
21 want. I asked Mr. Bazan, any restrictions you put on anyone
22 once they buy these products? Nope. They can wear it wherever
23 and however they want. We have evidence in the record that
24 people wear it with adidas shoes and socks. We're not saying
25 that happens all the time, but we're giving it as an example

N1CQadi1

Summation - Mr. Henn

1 that that is a very realistic possibility of what could happen
2 in the world. And if you thought this stuff looked confusing
3 like adidas before they wore it with adidas shoes, you can
4 image what it might look like somebody running by you wearing
5 adidas shoes and these striped outfits. You might think, oh,
6 they have a lot of adidas on.

7 The picture on your left, the guy with his knee up in
8 the air? That was posted out by Thom Browne's company to the
9 public. That was on their own social media feed, like, hey,
10 here's our stripes and wearing it with adidas socks. We showed
11 you this ad, mostly because I thought it was a nice break in an
12 otherwise mundane day, but this is a good example of what
13 happens. People buy Thom Browne's products, and then they can
14 do with it whatever they want and go wherever they want with
15 it. People can end up in gyms. Celebrities can end up in ads.
16 And, yes, it's funny. He's obviously not working out. He's
17 drinking milk out of a sippy cup. Yes, it's funny, but the
18 idea is they're placing this in the context of sport, adidas's
19 core area. And that's why in that wholesale world,
20 possibilities for confusion are much greater than at the
21 register.

22 We also know that because of how people wear clothes
23 and move about the world, the four stripes are not always going
24 to be visible. Even on Thom Browne's own website, he's got
25 models bunching up the shorts so you can't see all four stripes

N1CQadi1

Summation - Mr. Henn

1 clearly. I don't think it was done intentionally, but it's a
2 perfect example of how someone can be confused in the public.
3 Even if someone has four stripes, they are not always visible.
4 It's why just slapping a fourth stripe on wasn't the answer.

5 The products in the middle, remember I showed those to
6 Mr. Bazan, and I asked about the leggings on the guy. I said,
7 he's got your leggings on there, and the shorts are covering up
8 or his hand is covering some of the stripes, so you can only
9 see a couple of them, you can only see three stripes on the
10 shorts and on the leggings. His answer was to sort of deviate
11 and say, oh, but you see the four stripes on the top. What's
12 to say the person wearing the tights and the shorts out in the
13 park is also wearing a Thom Browne top? They might just be
14 wearing a black top. They might be wearing an adidas top. The
15 fact is you cannot ensure that consumers in the post-sale world
16 will always see all four stripes, and that's why four doesn't
17 solve the problem.

18 How else do we know that even when people are
19 presented with this, the degree of care doesn't prevent
20 confusion? Because we have the survey results. We talked
21 about the overall percentages, but I think equally important is
22 the verbatim responses. When people saw these striped designs
23 and repeatedly said, "I saw three stripes, three stripes, three
24 stripes, three stripes." Even though there's clearly four
25 white stripes there. It begs the question, are they looking at

N1CQadi1

Summation - Mr. Henn

1 from the negative space like Ms. Arbuckle? Or is this an
2 example of that Gestalt theory you heard Dr. Joachimsthaler
3 talk about where people don't sit down and count stripes, but
4 they get an impression based on their memory, adidas being
5 stripes? It doesn't matter which one is happening. You don't
6 have to resolve that psychological conundrum. You just need to
7 know that the empirical data from a survey to which there was
8 no rebuttal proves people thought it was adidas and saw three
9 stripes.

10 The same was true with the male products: Three
11 stripes, three stripes, three stripes. Same was true with
12 shoes: Three stripes, three stripes. And think about these
13 are people who are sitting down with no distractions on their
14 computer screen taking a survey, looking at the product for 15
15 seconds minimum, and then being asked immediately who puts this
16 out and why? Think of the degree of care they're engaged in at
17 that moment versus somebody on the street. Likely to be even
18 higher in those scenarios.

19 The Judge asked the witness a question, which I
20 thought was a good one, he asked Dr. Joachimsthaler, "Well,
21 what if people had problems with their eyesight when they took
22 the survey?" Well, two things. Dr. Joachimsthaler explained,
23 yeah, and people out in the real world, they have problems with
24 their eyesight, so guess what? You're going to have people who
25 don't see it clearly. But Mr. Poret also explained in his

1 N1CQadi1

2 Summation - Mr. Henn

3 survey, not only were respondents required to put on their
4 contact lenses or eyeglasses but after they saw the question
5 and before they answered the question about source confusion
6 and affiliation, they had to say, "I was able to view the
7 images clearly." There is no worry that in the survey people
8 weren't seeing what they were needing to see.

9 Another point on degree of care. This might be my
10 second favorite quote from Thom Browne during the trial while
11 he was on the stand. You remember when he was shown these
12 drawings offings early playing around with Three-Stripe band on
13 the sleeve? As counsel said to him, how many stripes are on
14 that sleeve? Mr. Browne said, "Four."

15 (Continued on next page)

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N1CsADI2

Summation - Mr. Henn

1 MR. HENN: There was sort of an awkward pause. And
2 all of a sudden he said, Oh, oh, wait, three.

3 Now, clearly that was a mistake. But guess what?
4 That's what happens in the real world, and you saw it here on
5 the stand from the man who drew the pictures himself.
6 Sometimes three looks like four. Sometimes you, guess what,
7 get confused, even when you're sitting on a stand under oath
8 and paying very careful attention. You can imagine what it's
9 like out in the world.

10 The last factor on likelihood of confusion is bad
11 faith. Again, if there is evidence of bad faith, it tends to
12 show confusion is more likely. But if you think, you know
13 what, Thom Browne didn't do anything wrong. He just made a
14 mistake. It's all right. He's still liable because confusion
15 is likely.

16 Let's talk about the evidence of bad faith. So we all
17 know back in 2007, adidas called and said, Hey, stop doing
18 three stripes. And Mr. Becker said, We'll do it. We're about
19 to go bankrupt. We don't need to fight. Hung up the phone.

20 We also know that Thom Browne's lawyers promptly
21 provided them with a full report, 40-something pages, of all of
22 adidas' trademark registrations and said to him, By the way,
23 that those covered mark vertically, horizontally, and
24 diagonally. And that was in 2007 the company's CEO was on
25 notice of adidas' trademark rights.

N1CsADI2

Summation - Mr. Henn

1 So a few months later Thom Browne and his design team
2 get together and they think, All right, can't do three. What
3 do we do? I've got it. We'll do four. We'll put another
4 stripe on top. Do they call the lawyers that just told them
5 adidas owned all these rights? Did they ask, Hey, is four an
6 infringement? Hey, if I put a fourth stripe on it, am I good
7 legally? No.

8 You heard Mr. Becker. It might have been the last
9 answer he gave on the stand. I asked him: Did you give an
10 opinion as to whether this was OK? He said, We didn't get any
11 opinions from them. So instead of checking with the lawyers,
12 Thom Browne starts slowly rolling four-stripe products out.

13 Now he's doing a lot of non-four-stripe products. We
14 looked at a lot of fashion show pictures. All kinds of very
15 creative, very artistic, very unusual products. None of which
16 are accused of infringement. He also started putting the four
17 stripes on cardigan sweaters. Not accused of infringement. He
18 ultimately added the four stripes to the shrunken suits. Not
19 accused of infringement.

20 Then there was sweat pant created, but it was a tiny,
21 tiny situation. You remember those invoices that one of the
22 last witnesses went through where my colleague Bethany asked
23 him to go through and find the highlighting somewhere in the
24 invoice? Well, if you want to spend some quality time, you can
25 go through those invoices yourself. We did some math for you.

N1CsADI2

Summation - Mr. Henn

1 Over a two-year period, Thom Browne told 374
2 sweatpants. So it was a tiny thing, tiny thing back then. And
3 then starting in 2016 the company decided, you know what, let's
4 expand this. Let's get into sportswear bigtime. Our key
5 growth pillars are sportswear. Because right now we're just a
6 niche brand. We have low awareness. It's just customers
7 within that tight fashion circle that really like Mr. Browne.

8 So guess what? Sportswear segment greatly expands in
9 2017, 2018. It's a business priority to go down the path of
10 selling more of this sportswear. Adidas calls in 2018 and
11 says, Hey, woah, we're seeing infringing product. What are you
12 doing? This is new stuff. You're putting it on shoes. You're
13 running it down the legs of pants. You're starting to sell
14 products that look like our products. That's not suits. We
15 didn't have a problem with the suits. So there was a call in
16 2018; stop doing this.

17 This is where bad faith gets really obvious. After
18 that call that put them on notice of adidas' rights and adidas'
19 objection, after that call they do the deal with Barcelona.
20 They do the deal with the Cavs. After that call, two years
21 later in 2020 they decide, you know what, let's release an
22 entire line of compression athletic products. And they told
23 Vogue magazine, this is the first for the brand. And
24 Mr. Browne testified, prior to this point, they hadn't sold any
25 legitimate athletic product. Two years after adidas objects.

N1CsADI2

Summation - Mr. Henn

1 That's not good faith. That's bad faith.

2 What else did they do that exhibits bad faith? Well,
3 they put all these products on a new section of their website
4 called active-wear. And you remember when the judge asked
5 about the definition of sportswear versus active-wear, and
6 Mr. Browne said active-wear, that's for athletics. That's for
7 sports. That's where they put these products that we accuse.

8 What else did they do? They started calling these
9 things running shoes, tech products, ski jackets. They started
10 using the language of sport to promote these products. This is
11 bad faith. When you go from a shrunken suit to a tiny handful
12 of sweatpants to full-on compression products that you promote
13 online with models wearing adidas shoes.

14 Same thing with the Grosgrain. Adidas doesn't say
15 it's a problem to put it on the back of a business suit or tuck
16 it inside the placket or on the buttons on your sleeve. That
17 is not going to cause confusion. But when you turn it on an
18 angle and you blow it up and you put it on a white shoe, that
19 is bad faith. Running that two-stripe design down the side of
20 a pant or in the classic position down a jacket, that is bad
21 faith.

22 And you might pause and think, Oh, well, but that's
23 his trademark. He should be able to do it. He did apply to
24 register that little flag, so he can stretch it out if he wants
25 to. So I asked Mr. Browne. I said, Hey, is this your

N1CsADI2

Summation - Mr. Henn

1 trademark, this stuff? Remember what he said? He said no,
2 that's just a design choice. I chose to do that. I chose to
3 do it. Didn't have to. That's bad faith, when someone does
4 that in the face of an objection from a trademark owner of one
5 of the most famous brands in the country.

6 And what a good deal it has been for them. Remember
7 their damages expert putting this up on the slide? Back in
8 2015, couple hundred thousand dollars of this stuff. Up to
9 \$4 million in 2021, last full year in this data. He's only
10 gone through November of 2022. It's small. That's bad faith,
11 going at it, doing more, selling more, selling more.

12 Do you remember in the opening when Mr. Maldonado said
13 this case is about property lines, and adidas needs to stay on
14 its property. I want you to think about that analogy when you
15 think about bad faith. So Thom Browne sells all these things
16 that adidas doesn't accuse. They are not active-wear. They
17 are not sports, even though he calls them sportswear. Use your
18 common sense on that. These are not the things that adidas
19 objects to now or ever objected to. We don't have an issue
20 with these. What adidas objected to and what is bad faith is
21 when Thom Browne moved on to adidas' property with sports
22 products, athletic products, running shoes that he wouldn't
23 advise you to run in but is still calling them running shoes.

24 And you are likely to hear a bit of an emotional plea
25 from my opposing counsel about adidas is trying to stop us from

N1CsADI2

Summation - Mr. Henn

1 doing everything. This brand means so much to us. Don't make
2 us stop. I want to put in context what adidas is objecting to
3 in light of the overall Thom Browne business. We heard they
4 are a \$300 million business, globally a \$300 million business.
5 You saw data from the last witness that, in the U.S. during the
6 last six years or so, they sold \$120 million of product
7 totally. The accused products, according to their expert, were
8 12 million. So adidas is only objecting to 10 percent of what
9 Thom Browne did.

10 It's worth thinking about. If 90 percent of your
11 product is outside of anything adidas cares about, why go on
12 their front lawn. You're like, oh, man, get off my lawn. Why
13 do that? You don't need that. And more importantly, why do it
14 with four stripes? He sells tons of products -- it's in
15 evidence -- tons of products with no four bars on them. If you
16 look at the exhibits that are his current website, a portion
17 has the four bars. He very easily could have started selling
18 compression products and running shoes and running shorts
19 without any objection to adidas if he had simply done it
20 without four bars on it, which would have brought that
21 10 percent number down to essentially nil.

22 Remember, they have done no market research, despite
23 the board of directors, they didn't do market research to see
24 if there is any brand awareness of the four bars, whether
25 anyone actually buys products because of the four bars. There

N1CsADI2

Summation - Mr. Henn

1 is no evidence that it does anything for their business, and
2 yet they went right into adidas' own court.

3 What else did they do that was in bad faith? How
4 about this one? Thom Browne sponsors a football game, not just
5 in the backyard among friends, where he's going to get them out
6 in his sweat suits. He invites Vogue magazine to attend for a
7 photo op, and he puts them all in adidas shoes. That's bad
8 faith, people. That's bad faith.

9 I also thought it was interesting. I asked Mr. Bazan,
10 who put out those shoes, and he could tell me adidas, even
11 though he couldn't read the word adidas. He saw the stripes.
12 He knew adidas.

13 What else is bad faith? How about the Facebook post
14 where they not only put a model on a track that's wearing
15 products that they suggest aren't really for running, and then
16 put them in adidas shoes and adidas sunglasses, and posted that
17 out to Facebook. That's bad faith.

18 And you're not really having to answer a separate
19 question in the verdict form about bad faith. The reason
20 you're considering bad faith is, is he doing things that are
21 going to make confusion more likely? This is a good example of
22 that. When you push out media that combines Thom Browne
23 products with adidas products, you are doing things -- you can
24 call it bad faith -- but really you're just doing things that
25 make confusion more likely.

N1CsADI2

Summation - Mr. Henn

1 Last point on bad faith I'll point out. Thom Browne
2 is not some naive, in the woods, knows nothing about
3 intellectual property and stumbled onto adidas' front lawn.
4 You heard testimony from Mr. Bazan that Thom Browne values its
5 trademarks and has gone after Rossignol and Moncler and Tommy
6 Hilfiger and Zara. And I didn't put the last one on because it
7 was funny. And you also heard that the Rossignol complaint
8 they raised was particularly out to this case because Thom
9 Browne claims its Grosgrain is five stripes -- white/blue/
10 white/red/white. He testified we went after Rossignol for
11 using three stripes.

12 They know that just taking a stripe away or adding a
13 stripe doesn't prevent confusion. So they did all of that
14 behavior I just went through knowing full well that the simple
15 difference in the number of stripes doesn't make a difference.
16 They knew what they were doing.

17 So the Three-Stripe Mark is a very strong, famous
18 mark. The marks are similar in the context in which you are
19 assessing likelihood of confusion. The products clearly
20 compete for the same consumers. There is survey evidence,
21 there is evidence of actual consumer confusion online. The
22 products are sufficiently similar in quality. And if anything,
23 the sports products being put out by Thom Browne are not up to
24 par when it comes to performance. There is a very low degree
25 of care by consumers in these contexts pre-sale and post-sale,

N1CsADI2

Summation - Mr. Henn

1 and there is substantial evidence of bad faith.

2 So what do you do with that? First question you're
3 going to be asked is: Do you find Thom Browne liable? We go
4 back to my shared services. It doesn't have to be beyond a
5 reasonable doubt. The question is, is it more likely than not,
6 just that much, is it more likely than not that people are
7 going to be confused. A survey proves it, and the rest of this
8 evidence helps support why that is happening. So you check
9 liable.

10 All right. The next thing you're going to be asked is
11 what do you award? Well, money. The first step is to look at
12 the evidence you have in the record of how this harms adidas.
13 We spent a lot of time with the first few witnesses talking
14 about how important adidas' brand is to its business, how core
15 it is, that it is the most valuable asset of the company. And
16 then you heard testimony from Mr. Murphy, Dr. Joachimsthaler,
17 about how confusion in the marketplace and dilution, which
18 we'll talk about in a minute, harms a brand. And the way it
19 does is you spent all of this time creating an image, an
20 impression in people's minds of certain attributes associated
21 with your brand, but when they encounter it in a different
22 context, it undermines those efforts. It causes the mark to be
23 less differentiated.

24 I said to Thom Browne on the stand, Are you aware of
25 any other companies using three stripes as a brand? No. Are

N1CsADI2

Summation - Mr. Henn

1 you aware of any other companies using four stripes as a brand?
2 No. Well, when you add a confusing brand, one that consumers
3 think is three stripes, we know from the survey data that
4 causes that Three-Stripe Mark to lose its differentiation in
5 the marketplace. It becomes less unique in the minds of
6 consumers. That was the testimony from Dr. Joachimsthaler. It
7 weakens those brand associations that people have that adidas
8 has spent all that time building.

9 It creates shared associations. And we're going to
10 talk about that which we talk about those memory networks in a
11 minute. That when those are disconnected, it hurts the brand.
12 It drives up the cost of marketing because you're going to have
13 to overcome the impact of that confusion. Also, the testimony
14 from Dr. Joachimsthaler that it reduces consumer loyalty.

15 Now, Dr. Joachimsthaler admitted and, in fact, no one
16 contests that these things are very difficult to measure, that
17 is why you're being asked to consider a royalty as a proxy for
18 a quantified measurement. The reason is, as Dr. Joachimsthaler
19 explained, these are things that happen in the minds of
20 consumers. Once someone has been confused, these things happen
21 in their mind. And it's not like you can then follow that
22 person around and see what they buy in the future. You know
23 that these have occurred, and the way you quantify it in a
24 trademark case is by saying, OK, we're going to measure that
25 harm as what would be the value of a license if Thom Browne had

N1CsADI2

Summation - Mr. Henn

1 bothered to come to adidas and say, Hey, let me move into your
2 yard, and I'll pay you a royalty for it.

3 So the damages in this case, that's the royalty fee.
4 The parties agree, you heard both Mr. Plumpe and Mr. Imburgia
5 say, that if you're going to award damages, that's the amount:
6 867,225.

7 There's also a profits calculation. Mr. Plumpe gave
8 you a very straightforward calculation. They sold
9 \$15.6 million worth of products. Deductible costs are
10 8.6 million. That results in net profits of 7 million. That's
11 the award.

12 Now, Mr. Imburgia suggests, no, no, that profit is
13 much lower. Thom Browne's losing money constantly. Selling
14 \$4,000 sweat suits and yet can't make a dime. To get there, he
15 proposes the nexus theory where he says pretty much everything
16 that the company does should be deducted from the revenue line,
17 so you can get to a very, very small profit line. The Met Gala
18 becomes an expenses that is related to the products that we're
19 accusing. Laundry services are being deducted. Gifts, lavish
20 trips to Paris. There is thousands and thousands and thousands
21 of dollars of just taxi expenses for Thom Browne that are
22 deducted from that number. And I mean the person, not the
23 company.

24 Remember when my colleague showed him the sweatshirt
25 and was, like, a \$1,400 sweatshirt. You're saying he only

N1CsADI2

Summation - Mr. Henn

1 makes 11 percent profit on this. He sells this for 1200, he's
2 losing money. There was a lot of fight about, Oh, I can't
3 possibly answer that hypothetical. You're allowed to use your
4 common sense. Does it make common sense to you if they sold
5 this for 1200 bucks, they would lose money on this product?

6 All right. So what do we do with the verdict form?
7 We fill out the monitor remedies. You're going to be asked
8 what the damages should be. That's where you write in 867,225.
9 You will also be asked what profits to award. That's the
10 7 million number there.

11 You're separately going to be asked about dilution,
12 and as the judge is going to tell you, we're only seeking the
13 monetary relief for the infringement claims, so what we've just
14 been through. But there is a separate claim for trademark
15 dilution. It's very similar to infringement. And as you'll
16 see in a minute, a lot of the factors are essentially the same.

17 I'm not going to repeat everything I just went
18 through, I assure you, but here are some of the factors. Well,
19 let me start by saying, two prevail on dilution, adidas needs
20 to show that its Three-Stripe Mark is famous, and that what
21 Thom Browne is doing is likely to dilute the distinctiveness of
22 that trademark. It's a lot of what we've already been talking
23 about.

24 As we went over before when I was talking about
25 strength of the mark, it is clearly famous. It has clearly

N1CsADI2

Summation - Mr. Henn

1 been famous for a long, long time. No one denies that the
2 Three-Stripe Mark is famous and is known widely by the general
3 public. There is really no evidence put in by Thom Browne on
4 the other side.

5 So the question on dilution for you is, really, are
6 these products likely to dilute the distinctive character of
7 the Three-Stripe Mark. And this is where you see some overlap
8 in the factors, so how similar are the marks. Well, we already
9 talked about similarity of the marks. OK. It's that notion of
10 people see it. And they think adidas, people see it and they
11 think three, and the context in which they are encountering
12 them.

13 How strong is the Three-Stripe Mark? We've talked
14 about that already. How widely recognized is the Three-Stripe
15 Mark. Again, we've already discussed that. Intent. In other
16 words, did Thom Browne do things intentionally to move into
17 adidas' area. We've been through that, so I'm not going to
18 repeat that. Those you should find essentially the same, for
19 infringement or dilution.

20 Now one of the factors is the extent of third-party
21 use of stripes. Ms. Arbuckle came to talk to you about third-
22 party use of stripes, and she showed you some very interesting
23 stripes from the 1800s, 200 years before the United States
24 Patent Trademark office granted adidas' trademark registration.
25 That is it not making the mark weak. Those antebellum outfits

N1CsADI2

Summation - Mr. Henn

1 and military uniforms do not somehow dilute the Three-Stripe
2 Mark in 2023.

3 The other factor is has there been evidence of actual
4 association. Now, similar to confusion and infringement, the
5 test is a likelihood of dilution, not actual dilution. OK.
6 So in the context of confusion, I said we don't have to show
7 actual confusion. But where it exists, pretty obvious that it
8 is likely. With regard to dilution, the same kind of analysis
9 applies. The test is likely dilution. But where there is
10 evidence of actual association, dilution is very likely.

11 So what is the evidence of actual association? Well,
12 again, we've got social media posts in the record where people
13 saw these products and thought adidas. Now this person writes
14 "mock adidas." So this person was not confused, right. They
15 didn't think it was adidas. They are pointing out that it
16 looks like adidas. That's the difference between infringement
17 and dilution. Infringement is about are they confused.

18 Dilution is are they associating these two designs in
19 their mind, and if they are, that's what dilution is. Because
20 when you associate them, you start blurring the lines between
21 what is adidas and what is not. So this person clearly
22 associated it with adidas. This person also associated it with
23 adidas. Probably not somebody who was confused, right. They
24 say "adidas" and they've got little laughing emojis. They
25 figured out it wasn't adidas, but adidas came to mind when they

N1CsADI2

Summation - Mr. Henn

1 saw these, and it could be because of how the stripes are.

2 Adidas and the survey, remember, it asked those
3 questions about do you think this is affiliated with,
4 connected, sponsored by adidas? And you had overwhelming
5 levels. Everyone who said adidas in response to Hal Poret's
6 survey necessarily thought adidas because they couldn't have
7 figured out how to type it out if they didn't think of it. The
8 survey is also evidence of association.

9 Then we had a long testimony about how the brain
10 works, and I don't want to bore you with all of that again.
11 Suffice it to say, we were trying to explain through
12 Dr. Joachimsthaler how dilution happens because it's kind of a
13 fuzzy concept. You're like, wait a minute, how is this a
14 problem? Dr. Joachimsthaler explained that we have these
15 memory networks in our head because of exposure to brands, and
16 then he relied on tons of empirical research, a study from 2005
17 that showed that, unprompted, just think of adidas in your
18 mind, what do you think of? Three stripes, 65 percent. Almost
19 as much as Nike. Remember in the study, 70 percent said the
20 swoosh.

21 He did his own survey where 52 percent associated
22 three stripes with adidas and he relied on studies that adidas'
23 outside market research companies had done where three stripes
24 was at the center of what respondents in their survey said when
25 they asked about adidas. So this is based on hard science.

N1CsADI2

Summation - Mr. Henn

1 We went through tons of market research decks. You
2 were probably wondering, why am I looking at all these spider
3 graphs? The reason was because Dr. Joachimsthaler used those
4 spider graphs in order to fill out his model of how an example
5 of an adidas memory might be. Yours might be different. Mine
6 might be different. Everyone in this courtroom might have a
7 slightly different memory network. This is representative.

8 The idea is that stripes are closely associated as are
9 things like authenticity and sport credibility. And then he
10 went about trying to come up one for Thom Browne. They don't
11 do any market research, so he is basing this on what testimony
12 he was able to read and what documents he was able to review.
13 Then he said, OK. How do we know whether there is actual
14 association? How do we know that one of these memory networks
15 gets triggered by the other. You know what, let me look at the
16 data.

17 And he went back to Hal Poret's survey and he looked
18 at those verbatims. And he said, Oh, we have hard data that
19 these memories are getting blurred, because people saw the Thom
20 Browne products and they thought adidas, and they saw three
21 stripes. With women's products, with men's products, and with
22 the shoes. Again, empirical proof for what Dr. Joachimsthaler
23 told you.

24 And so then he says, What happens based on decades of
25 consumer psychology research? What happens? Spreading

N1CsADI2

Summation - Mr. Henn

1 activation or activation spreading. The idea is when you see
2 the four stripes of the Grosgrain and you think of adidas,
3 those things get connected. And it sounds kind of crazy. But
4 guess what? The two Ph.D. doctors that came in both agreed
5 that this is sound science. Dr. Joachimsthaler described it,
6 and I asked Dr. Steckel, you agree with me that spreading
7 activation is well-settled in this area. And he said it's
8 basically the foundation of a lot of market research. We know
9 this is how this happens. And so based on the data in the
10 case, you have a lot to rely on.

11 And what was Thom Browne's evidence on this? Nothing.
12 Remember I asked Dr. Steckel, are you offering an opinion that
13 this doesn't happen? Oh, no, no, no. I'm not offering that
14 opinion. Are you offering an opinion that the market is not
15 famous? Oh, no, no, not offering that. Are you offering any
16 opinion that dilution is not likely? Nope. Nope, not offering
17 that opinion.

18 So there is no response in the record. So the mark is
19 famous. It has been for decades. The products are clearly
20 likely to dilute the distinctiveness of the Three-Stripe Mark,
21 and there is no counter evidence for you to put on the other
22 side of the scale there. So when you're asked about dilution,
23 you should find Thom Browne liable.

24 I'm going to finish where I began, and that is you
25 might like adidas. You might not like them. You might like

N1CsADI2

Summation - Mr. Henn

1 Thom Browne. You might not like him. But really what you're
2 here to do is to protect the public from confusion. That's
3 your job. If you think that the evidence was more in favor of
4 a likelihood of confusion, you have to find Thom Browne liable,
5 and you have to do that on behalf of the consuming public. The
6 same public, 27 percent of whom were confused by what they were
7 shown in the Poret survey.

8 Thanks for your attention.

9 THE COURT: Thank you very much.

10 All right, ladies and gentlemen, we'll take a
11 15-minute break.

12 (Jury not present)

13 There was an objection.

14 MR. HENN: Yes, your Honor.

15 We obviously do not object, as I just did as to
16 referring to testimony, but several of the slides in
17 defendant's decks have actual transcript pages which is, I
18 believe, improper to show a jury since the transcripts are not
19 evidence and they are supposed to be deciding on the collective
20 memory of the witnesses that occurred on the stand.

21 THE COURT: No, no. I think someone put up on the
22 screen an example of one of these demonstratives.

23 I'm going to see where the reference is to page
24 numbers.

25 MR. HENN: It's at the lower right corner.

N1CsADI2

Summation - Mr. Henn

1 THE COURT: Oh, I see. First of all, I don't see any
2 objection.

3 Second, I think it's mainly an eye test for our
4 jurors.

5 But no, that objection is overruled.

6 MR. HENN: Thank you, your Honor.

7 THE COURT: Very good. See you all in 15 minutes.

8 (Recess)

9 Please get the jury.

10 All right. We're ready to hear from defense counsel.

11 MR. MALDONADO: Thank you, your Honor.

12 Ladies and gentlemen of the jury, adidas does not own
13 stripes. Remember that as you consider the evidence, as you
14 consider your verdict. Adidas does not own stripes. And
15 that's what this case is about. It's not about competition.
16 These parties do not compete. It's not about diluting the
17 adidas brand. You haven't seen any evidence of dilution of
18 adidas' brand. This question is about does adidas own stripes,
19 and adidas does not own stripes.

20 Now before we get into the summary of the evidence --
21 and I'm going to be the last lawyer to speak to you; we're
22 almost at the end here -- thank you. I want to thank you all
23 for your time that you devoted to this and for listening to the
24 evidence, for your patience. We've seen each other every day
25 for the past two weeks, and it's almost at the end. I want to

N1CsADI2

Summation - Mr. Henn

1 thank you for staying engaged even when it was difficult, even
2 when you heard witness after witness get on the stand and talk
3 about things that don't matter.

4 But remember, as I told you during my opening
5 statement, the facts in this case are simple. And hopefully,
6 by now, you've heard all the evidence and you agree that the
7 facts in this case are really quite simple. Now, you've made a
8 sacrifice of your time. Thank you for being here. Many if not
9 all of you did not know Mr. Thom Browne when this case started.
10 But now you do. He's been here in court every day. He's here.
11 He's testified. He's told you his story. And it's a very
12 different story than what you've heard from Mr. Henn. He's
13 here because he cares a lot about this case. For himself. For
14 his employees.

15 The defendant Thom Browne, Inc., the company that he
16 founded, he poured his heart, his soul, and every penny he
17 earned into his company. He devoted himself to his company
18 100 percent. He's worked to build a reputation and a brand,
19 and he succeeded, and that is why he's here today. He's
20 recognized as a game changer. An icon in the fashion industry.
21 This case is important to him, and he's here for that reason.

22 Quite frankly, ladies and gentlemen, the notion that
23 Mr. Thom Browne wants to trade on the reputation of adidas and
24 build his brand on adidas, a performance sports company, that
25 offends him. Nothing against adidas. They are a great

N1CsADI2

Summation - Mr. Henn

1 company. They are successful at what they do. But Mr. Browne
2 is not adidas.

3 Now, ladies and gentlemen, Mr. Browne took the stand
4 and told you under oath his story, and I know that you listened
5 to it. You didn't hear any mention of adidas in that story,
6 aside from the dispute that arose in 2007 and then laid dormant
7 and quiet for more than ten years until 2018. You didn't hear
8 any testimony from him, or from anyone else at his company,
9 including his director of design, about adidas. They never
10 talked about adidas. They never considered adidas. They
11 didn't have any interest in imitating adidas.

12 And why not? Because Mr. Thom Browne is a luxury
13 designer. And as I told you in my opening, and as the evidence
14 has shown, Thom Browne and adidas are worlds apart. Why on
15 earth would a high-end luxury brand like Thom Browne want to be
16 associated with a performance active-wear company like adidas?
17 There is no reason for that. You didn't hear any reason from
18 Thom Browne's witnesses, and you didn't hear any reason from
19 adidas' witnesses. There simply is no reason.

20 And it's my hope as you sit here and you listen to the
21 evidence and you got to know Mr. Thom Browne as a person, as a
22 designer, and as an icon in the fashion industry, you got a
23 sense for his company, from the rack of clothing that we
24 brought into this courtroom and you got to see. This is Thom
25 Browne. This is the clothing that he sells. And on that rack,

N1CsADI2

Summation - Mr. Henn

1 yes, there is sweatpants that are accused of infringement.

2 There is a sweatshirt accused of infringement. But this is how
3 he displays his goods. This is how he sells his goods. This
4 is who he is, and that's what we wanted you to see.

5 Now, Mr. Henn would like you to take those sweatpants
6 off the rack and throw them on a chair and pretend that that is
7 Thom Browne. But that's not Thom Browne. And you saw him in
8 his presentation earlier, when he was examining witnesses, you
9 saw him take the clothes off the rack and throw them on the
10 chair. He wants to create a different Thom Browne that is not
11 Thom Browne. It's not a Thom Browne that exists in this world.

12 Now, the court will instruct you on the law, but as
13 the court told you, you're not going to be asked to decide
14 whether adidas' claims are too late and should be barred
15 because adidas unreasonably delayed in complaining about what
16 Thom Browne was doing. The judge will decide that issue.

17 Instead, you'll decide whether there is trademark
18 infringement and whether there is dilution. There isn't.
19 There is no trademark infringement. There is no dilution. In
20 deciding those issues, the long history of this dispute, and in
21 particular the silence by adidas over ten years as Thom Browne
22 grew his business and built his brand, will still be relevant
23 to your consideration of whether Thom Browne in any way acted
24 in bad faith. He did not act in bad faith. Every decision he
25 has made, every step of the way, has been made in good faith

N1CsADI2

Summation - Mr. Henn

1 and in full respect of adidas' asserted rights to three
2 stripes. They told him to stop, and he did.

3 As I said to you before, adidas does not own stripes.
4 And I ask you to keep in mind, as you evaluate the evidence and
5 reach your verdict, the fundamental facts that I pointed out to
6 you during my opening. You may recall that adidas' rights in
7 the Three-Stripe Mark are limited. That Thom Browne uses four
8 horizontal bars on the left side, not three vertical stripes.
9 There is no evidence of confusion in this case in the 10,
10 15 years that Thom Browne has been selling sweatpants. He's
11 been using the four bars. He's been using the Grosgrain. No
12 evidence of confusion at all. And fourth, the parties are
13 worlds apart and they do not compete.

14 So let's take a look now at the evidence. As Mr. Henn
15 told you, we're going to look at the likelihood of confusion
16 factors in deciding whether there's confusion between these
17 products. And, first of all, we're going to look at the
18 registered trademarks. And you've seen these during the
19 presentation of evidence. Adidas owns registrations for
20 clothing, and that's shown on this slide. Each item of
21 clothing, you see three stripes, vertical stripes on both
22 sides.

23 In all the registrations, the last one is what we call
24 a quadrilateral registration, which we'll talk about
25 separately. On this slide, we see footwear. adidas owns and

N1CsADI2

Summation - Mr. Henn

1 asserts in this action these registrations on footwear. In
2 each one you see three diagonal stripes. Again, we have the
3 quadrilateral registration at the end. That applies to the
4 apparel and the clothing. No horizontal stripes in neither of
5 these slides.

6 Finally, here is the headwear. These are the
7 registrations asserted in this case that adidas owns and is
8 asserting, even though as you've seen through the lists of
9 accused products, there is no hats that are accused of
10 infringement in this case. And you see over there on the rack
11 that we brought into court, you see a hat. And that hat has
12 four vertical bands down the front. adidas owns a registration
13 for a hat with three horizontal lines around the rim. That hat
14 is not accused of infringement. Those vertical stripes or
15 bands do not infringe those horizontal bands. Keep that in
16 mind as you consider the evidence.

17 Also, as you look through the trademark registrations
18 owned by adidas, you'll see since these are design
19 registrations. Each registration also includes a description
20 of what the trademark is. You'll have a chance to look at all
21 these and read those for yourself. They are all described in
22 words. It's not just pictures. And in this case for this
23 963 registration, you see the mark consists of three parallel
24 bands positioned along the length of each sleeve of a jacket,
25 and it tells you that this image that accompanies the

N1CsADI2

Summation - Mr. Henn

1 registration is intended to show the position of the mark.

2 It's not covering a trademark in any other location or any
3 other number of stripes.

4 Is there a likelihood of confusion? Decide for
5 yourselves. Look at these registrations, three stripes down
6 the sleeve. Look at these accused shorts. We've got four
7 parallel bands on the left side only. Nothing alike. No
8 confusion. Now, to be sure, adidas does own a registration for
9 shorts. But, again, it's three vertical stripes down the
10 sleeves of the shorts.

11 Let's talk a little bit about this registration. This
12 is what we call the quadrilateral registration. Now, in this
13 case, adidas has a trademark registration for this design, and
14 it's described as you see in the registration certificate as
15 three diagonal quadrilaterals positioned parallel to each other
16 upon a contrasting background. And you look at the items
17 accused of infringement, the items sold by Thom Browne. You're
18 not going to see any parallel diagonal quadrilaterals as shown
19 in this trademark registration. Is there a likelihood of
20 confusion?

21 Here's an example. Here is the registration we just
22 discussed. Here is a polo shirt accused of infringement. It's
23 got the Grosgrain down the sleeve on the side there. That is
24 nothing like the quadrilateral registration on the left there.
25 Those are not diagonal lines.

N1CsADI2

Summation - Mr. Henn

1 So what is the Three-Stripe Mark? That's the big
2 question of the day. What is this Three-Stripe Mark that
3 adidas asserts?

4 We've heard testimony from various adidas' witnesses,
5 and there's someone mystery about what this Three-Stripe Mark
6 is. So we look here at the testimony of Chris Murphy, and he's
7 the senior vice president of brand marketing at adidas. Now,
8 he was asked about adidas' trademarks, you know, and he says,
9 is adidas known for two stripes? It's not known for two
10 stripes, is that right? He said correct. adidas is not known
11 for five stripes or six stripes? That's true. adidas is not
12 known for four stripes? That's true. In fact, adidas doesn't
13 use two stripes? We do not. adidas doesn't use four stripes?
14 No. Or five stripes? Or six stripes? No, no, no. It's
15 always three? Correct. And adidas is not known as a
16 four-stripe brand? We are not. Or a brand with four stripes?
17 No, we are not. Is adidas a brand with horizontal stripes?
18 No, we are not. And it isn't known for any number of stripes
19 other than three? Correct.

20 Yet you then hear testimony from Ms. Dana Kabela, and
21 she is a director of trademark counsel for adidas. Now adidas
22 is known for a number of stripes, doesn't own rights in any
23 other number of stripes. Yet when you ask, Does adidas claim
24 rights in two stripes? Well, we are not claiming rights on two
25 stripes, but two stripes can infringe the Three-Stripe Mark.

N1CsADI2

Summation - Mr. Henn

1 Oh, really. How about four stripes? Yes, that can infringe,
2 too. Oh, so what about one stripe? Yes, that can infringe,
3 too. OK. How about five stripes? Yes, that can infringe,
4 too. Can six stripes infringe? Yes, six stripes can infringe,
5 too.

6 So any number of stripes can infringe the Three-Stripe
7 Mark. adidas believes it owns stripes, but it doesn't.

8 We heard testimony from Ms. Vanessa Backman. I'm sure
9 you won't forget that testimony. Let's hear a snippet from
10 her. She was the in-house counsel at adidas when this dispute
11 first arose in 2007. She reached out to Thom Browne. She made
12 him change, she made him drop his three bars. And let's see
13 what she thinks of Three-Stripe Mark is.

14 (Video played)

15 That's the definition of the Three-Stripe Mark. It's
16 the Three-Stripe Mark. What does that mean? Nobody knows.

17 And so the witnesses have different ideas, different
18 answers to this. If we look here at the next slide. We talked
19 about what was referred to as smushed stripes. These are
20 stripes that are smushed together. There is no space between
21 the stripes. And we had Mr. Chris Murphy, the senior vice
22 president of brand marketing at adidas, testifying about the
23 Gucci stripes on this article of clothing, this collaboration
24 article of clothing here shown on slide 18.

25 And the question was, It's your testimony that the

N1CsADI2

Summation - Mr. Henn

1 green/red/green -- that's the three stripes no spaces in
2 between -- is that adidas' Three-Stripe Mark? He answers, I
3 didn't create the product. It certainly could be. But can we
4 agree that's not adidas' stripe mark, the green/red/green?
5 Well, it could. Then he says, We use three stripes in a number
6 of ways. Sometimes smushing the stripes together, sometimes in
7 different patterns. I'm sure we've used green/red/green in the
8 past.

9 Ladies and gentlemen, I don't think you've seen any
10 examples of adidas stripes smushed together. And yet adidas
11 thinks it owns stripes smushed together. Or does it? When we
12 asked Ms. Sara Vanderhoff about stripes smushed together, the
13 question was: If three stripes or stripes are together,
14 squished together with no space in between, would that be a
15 version of the Three-Stripe Mark? Ms. Vanderhoff said, I would
16 have to see it, but typically we do have a space between the
17 stripes.

18 We asked her about the Gucci trademark where the
19 stripes are squished together. She said, That is Gucci's
20 trademark, that's not Three-Stripe Mark. So according to one
21 adidas witness, the Gucci stripe is the three-stripe trademark
22 and another witness says it is not. It's a complete lack of
23 clarity.

24 Now let's talk about orientation, because as I've told
25 you and as you've seen in the registrations that adidas owns,

N1CsADI2

Summation - Mr. Henn

1 adidas' three stripes are vertical. They are down the side of
2 at pant, down the side of a sleeve. In this case, they are
3 asserting them against Thom Browne's four bars, which as you
4 see are horizontal.

5 What rights does adidas own? So let's look here at
6 the testimony of Chris Murphy. Now, Mr. Murphy was asked what
7 the Three-Stripe Mark is, and he says it's three parallel
8 stripes. Does it matter how big or small they are? Nope, it
9 doesn't matter. We've gone through all the products. They are
10 shown in a variety of width, variety of colors, and a variety
11 of placements.

12 He's asked, Is the horizontal use of three stripes
13 different from the vertical use of the three stripes? His
14 answer, It's not. We're the brand with three stripes. Just to
15 be clear, how many Three-Stripe Marks does adidas own? Only
16 one.

17 So adidas believes that it's one Three-Stripe Mark is
18 not only vertical, but it's horizontal. It's any number of
19 stripes together, separated. Doesn't matter. But then again,
20 it depends on who you ask.

21 Now, Mr. Murphy showed us a collection that he made of
22 exemplary ads. These are ads of adidas goods, and he put
23 together this whole collection of ads, Plaintiff's Exhibit 22.
24 Look through all that. You'll get the evidence at the end of
25 this. You can go through the exhibits yourselves. If you want

N1CsADI2

Summation - Mr. Henn

1 to take a look at Exhibit 22, look at all the examples of
2 adidas' use of stripes. As you go through this exhibit, you're
3 not going to see any use of horizontal stripes. You're going
4 to see vertical stripes, and that is what adidas is known for.

5 Mr. Paul Bowyer, you may remember him, the VP of
6 originals, partner brands and basketball at adidas. He was
7 asked about horizontal stripes, and he presented this Exhibit
8 84, which you'll see the first page of here on the screen. And
9 he told you, well, this is a compilation that adidas put
10 together, and this was done after his deposition when he was
11 asked, how long has adidas been using horizontal stripes? He
12 said, Well, I don't know. So after his deposition he did some
13 research. And adidas said, let's go through all our archives
14 in Germany, wherever they keep them, and let's see how long
15 have we been using horizontal stripes. They put together this
16 wonderful exhibit here at the convenience of all of you, so you
17 can see indeed how long has adidas been using horizontal
18 stripes.

19 And he says, you know, the first use that he was able
20 to find goes back to 1979, and he shows horizontally on the
21 sleeves of polo shirts. But you'll see that this collection is
22 not just horizontal stripes. It also includes various other
23 stripes -- I'm sorry. One second.

24 You'll see also that this exhibit here, you'll see how
25 many items. We asked him, How many items have you sold in the

N1CsADI2

Summation - Mr. Henn

1 past that have horizontal stripes? And he says, I couldn't
2 tell you exactly how many horizontal, vertical, or diagonal.
3 They don't classify that in their systems. They don't track
4 that in their systems.

5 Yet, he did testify and told you that each year, or
6 each season, adidas makes 40,000 original styles. 40,000 per
7 season. That's 80,000 original items, styles per year. Now
8 this exhibit that we just looked at collected examples of
9 horizontal stripes over the past 50 years. This is 50 years of
10 adidas products, collection of their use of horizontal stripes.
11 That's 50 times 70. We're talking, like, one and a half
12 million styles over that time period. And out of those, adidas
13 presented us with just 163 pages showing horizontal use of
14 stripes. Over 50 years, 160 pages. That's a very minute
15 percentage. He was asked and he agreed, a very minute
16 percentage.

17 Ladies and gentlemen, adidas is not known for
18 horizontal stripes. Whatever minimal use they may have made
19 over the last 50 years, that's not what they are known for.

20 These are other examples that are in the same book
21 that we just looked at. And as you look through the evidence,
22 ask yourself as you see things like this, is this really
23 adidas? I mean, these are various uses of stripes. You see
24 V stripes on these various jackets. These are adidas products,
25 but this is not what adidas is known for.

N1CsADI2

Summation - Mr. Henn

1 You heard some testimony and saw some evidence about
2 the Neuclassics, adidas' Neuclassics collection. When was that
3 launched? This was launched just last year. This is a new
4 collection launched just last year where adidas decided to use
5 three horizontal stripes only on the left sleeve, as you see
6 here in this image. Just last year they made that decision.

7 And this is the adidas Adicolor Neuclassics hoodie, as
8 you see here on the screen in front of you, and adidas tells
9 you in its own description. This is its own add-on his web
10 page where it advertises this product. And if you look at this
11 here, it tells you that the stripes are not where you usually
12 see them. This is not a usual branding that adidas has used.
13 Adidas has decided, for this collection released just last
14 year, that it is only going to wrap its stripes around one
15 sleeve, on the left sleeve of the top. That's just a decision
16 that they made last year.

17 Now, we've talked about this says it's not where you
18 usually see the adidas stripes. So one of adidas' witnesses
19 testified, Where do you usually see the adidas stripes? This
20 is what adidas refers to as the classic positions. And this is
21 Dana Kabela, the director of trademark counsel for adidas. She
22 was asked, And what are the classic positions of the
23 Three-Stripe Mark? She tells us the classic positions are, for
24 example, on the sleeves, running from the neck to down the side
25 of the sleeve. On both sides, left and the right? Yes. And

N1CsADI2

Summation - Mr. Henn

1 what are other classic positions? On the pants, on the sides
2 of the pants in a vertical position.

3 Ladies and gentlemen, that is what adidas is known
4 for. Those are the classic positions. Now, adidas has
5 internal branding guidelines. Adidas, as you know, is a huge
6 company, worldwide company based in Germany. They have
7 designers all over the world designing their products. They
8 have to provide some guidelines for their designers, how can
9 you use stripes when you're designing adidas products. They
10 want to make sure people aren't doing things they shouldn't do.

11 Why? Because they want brand consistency. They want
12 you to know, when you see stripes on a product, that it is
13 adidas. They want to make sure they are using their brand in a
14 consistent way. And they say in this branding guideline, here
15 on slide 28, consistent use of branding means that we can
16 maintain exclusive ownership for our trademark and broadens the
17 scope of the protection that we have for them.

18 Let's see what the branding guidelines say about
19 stripes. So there is this guideline here on the angling of
20 stripes. As I told you, adidas is known for vertical stripes,
21 and so sometimes designers may want to tilt the stripes. So
22 you can tilt them, but only to 20 degrees. So it can be
23 vertical or tilted to 20 degrees. That's it. No further.

24 It even says at the bottom here, do not use
25 horizontally. These are in adidas' branding guidelines, do not

N1CsADI2

Summation - Mr. Henn

1 use stripes horizontally. These branding guidelines include
2 examples of what is not permitted. These are three stripes
3 violations. These are things that are not permitted by adidas'
4 own internal branding guidelines. And here you'll see example
5 after example of horizontal stripes used on polo shirts. Not
6 allowed. Those are violations. In fact, it says here at the
7 bottom, as you can see hopefully on your screen, vertical only.
8 Do not use horizontally.

9 Let's talk about shoes for a minute. Adidas has
10 guidelines about shoes and how you apply stripes to shoes, and
11 one of their guidelines says that you cannot apply the stripe
12 on the same color background, because then you won't see it.
13 You can't use a white stripe on a white background because then
14 you won't see it. They give this example in their materials,
15 and they claim that this is a violation of their guidelines.
16 This particular shoe -- white stripe, white background --
17 violates adidas' guidelines.

18 Yet, curiously enough, if we look at this Thom Browne
19 product on the right accused of infringement, the middle white
20 stripe is on a white shoe, a white background, and adidas
21 accuses that of infringement. Something their own designers
22 can't even do with their shoes, Thom Browne does it, it's an
23 infringement. Ask yourself, does that make sense?

24 Another example here on your screen, product branding
25 guidelines. Here you see jogging pants, jogging pants with

N1CsADI2

Summation - Mr. Henn

1 three bands around one leg. Again, assymetrical use of three
2 stripes, horizontal stripes, three horizontal stripes on only
3 one side of the sweatpants. Adidas says you can't do that.
4 Adidas identifies this as recent executions that undermine our
5 trademark rights. These are things that adidas tells its
6 designers you cannot do.

7 So as you review all of this evidence, you ask
8 yourselves: How is anyone supposed to know what this
9 three-stripe trademark is? If you're a designer, an industry
10 out there making clothes, making products for all of you to
11 wear, how are you going to know what you can and can't do with
12 all these different and inconsistent messages coming from
13 adidas?

14 Now, you did hear testimony from Ms. Joanne Arbuckle,
15 former dean at FIT, and she went through the history of
16 stripes, the history of the use of stripes on clothing.
17 Mr. Henn put up some images she found from the 1800s on the
18 screen. But she also found a lot of very current references of
19 how other people are using stripes, and those are summarized
20 here. These are some of them. There is others as well. This
21 is what we can fit on this particular screen of examples that
22 she found of the use of stripes on clothing. You can see it
23 here used on jackets. You can see it used on peacoats. You
24 can see it used on sweaters. You can see it used on
25 sweatshirts. You can see it used on jogging pants.

N1CsADI2

Summation - Mr. Henn

1 By various designers, including high-end luxury
2 designers, Givenchy, we have Karl Lagerfeld, we have Celine.
3 These are all high-end luxury designers using stripes on
4 clothing. Stripes on clothing are not new. You can look in
5 your closet, look at all the clothes you have. I'm sure you'll
6 see stripes in there. Go in the subway, walk around, you'll
7 see stripes all over the place. People always use stripes on
8 clothing. They always have and they always will.

9 Now, adidas focuses its infringement claims in this
10 case only on selected products. Now, adidas sells a lot of
11 products, some of which are here on the rack in front of you
12 that are not accused of infringement but do bear the four-bar
13 designs. Somehow adidas has decided that some products
14 infringe and some don't.

15 I showed you during testimony a cashmere sweater
16 without a hood. That's not accused of infringement. And
17 another cashmere sweater right next to it, it has a hood, it is
18 accused of infringement. adidas doesn't necessarily own rights
19 in hoods, but one product is accused and one is not. Their
20 infringement allegations are random.

21 (Continued on next page)

N1CQadi3

Summation - Mr. Maldonado

1 MR. MALDONADO: (Continued)

2 Now, Thom Browne, there are over 130 products in this
3 case accused of infringement. And that's just a small subset
4 of the products that Thom Browne sells, but all of these
5 products do fit within Thom Browne's collection. He makes a
6 collection of clothes, and he fits these items into his
7 collection so that people can buy jackets. They could buy
8 sweats. They could buy shirts. They could buy ties that meet
9 all their needs through his collection, and that's what he
10 tries to do as a designer.

11 So, in sum, if you look at the registrations that are
12 owned and asserted by adidas on the left here. If you look at
13 unregistered uses which are shown on the bottom, some which
14 adidas calls violations but nonetheless are executions of
15 adidas, and you compare those to what's infringed in this case,
16 or what's accused in this case, rather, you see the sweatshirt
17 with the red, white and blue Grosgrain down the sleeve.
18 Another sweatshirt with four bars down the sleeves. Ladies and
19 gentlemen, these are not at all similar to what adidas owns or
20 claims it owns. There's no difference here. There's no
21 confusion.

22 So we talked about the differences in the marks. We
23 talked about the strength of Three-Stripe Mark that's asserted
24 in this case. Both of those factors weigh against the finding
25 of confusion.

N1CQadi3

Summation - Mr. Maldonado

1 Let's talk now about competition. Competition for the
2 same consumers. As you know, and as you've heard throughout
3 this trial, the parties' products are vastly different price
4 points. As this slide shows, an adidas pair of sweatpants \$40.
5 Thom Browne pair of sweatpants a thousand dollars. Now you
6 have the sweatpants here that I showed you during testimony,
7 and those are right here, and you've had a chance to feel them
8 and touch them and see them up close. You can tell the
9 difference in quality. It's not the same. You had a designer
10 of Thom Browne sweatpants here on the stand to testify. His
11 sweatpants are tailored. They're expensive. They're not to
12 wear to the gym. They're to wear out to look good. And they
13 are often worn, as you see in this image right here, with a
14 button-down white shirt. They're worn with more formal
15 clothing as you see here. They're not the same products.
16 They're not even competitive products.

17 Mr. Thom Browne was asked about these items of
18 clothing: What's the retail price of this item that was shown
19 here on the screen?

20 And he says around a thousand dollars, \$1,200. And he
21 says, you know, this combined suit, the top and bottom of this
22 track suit would cost several thousand dollars? Yes. That's
23 how much it costs.

24 Now we talk to Chris Murphy. He's a senior VP of
25 brand marketing at adidas. Now, Mr. Murphy was asked about

N1CQadi3

Summation - Mr. Maldonado

1 adidas's goods and where they're sold. And we showed him a
2 document which was a marketing update and we showed him some
3 images from that document that you see here on the screen.

4 Mr. Murphy talked about shop-in-shop spaces. This is where
5 adidas has a shop within a department store, example. If you
6 go here -- in this example, if you go into Dicks, there's a
7 section in Dicks where you'll find adidas goods, and that's
8 called a shop-in-shop. So adidas has a shop-in-shop in Dicks
9 Sporting Goods that's dedicated to its products. Adidas also
10 has a shop-in-shop at Foot Locker, and that shop-in-shop at
11 Foot Locker, again, dedicated to adidas products.

12 Now, then we asked Mr. Murphy, well, do you think that
13 when someone -- do you believe that when someone says does
14 adidas sell or is adidas known for high-end luxury, that most
15 people wrote say yes? And he said, "I think a good number of
16 people would say yes, especially based on some collaboration
17 they've been doing.

18 "Do you believe most people would say yes?

19 "A lot of people would say yes.

20 "Now that's true even though adidas sells its products
21 at Dicks Sporting Goods?

22 "Correct."

23 So he believes that even products sold at Dicks
24 Sporting Goods are luxury products, even though high-end luxury
25 products are sold at stores like Bergdorf Goodman, Saks Fifth

N1CQadi3

Summation - Mr. Maldonado

1 Avenue, and other chains we've heard about during this trial.

2 Now, Thom Browne, you've heard about his clothing, his
3 style, his aesthetic. You've heard from Lucas Langellier, the
4 VP of retail at Thom Browne. And part of Thom Browne -- part
5 of what Thom Browne is, is not only the tailored clothing that
6 he designs and sells, but also really a tailored customer
7 service experience. And Mr. Langellier explained this to you
8 in his testimony; that when you go to a Thom Browne store, you
9 get attention. You get personalized attention. Someone will
10 come up to you. They'll talk to you. They'll ask you
11 questions. They'll get to know you. They want to know what
12 you want. They want to show you what you might want, what you
13 might need. It's a very different experience from shopping in
14 other stores. What they're trying to do in this sense in their
15 stores, in their retail stores is to build relationships with
16 customers, so that the customers become loyal to the brand.
17 They'll come back. They'll purchase more. They'll be loyal to
18 the product. And that's how they build their brand loyalty.
19 Again, as we said, Thom Browne's products are sold at major
20 department stores at Barneys, at Bergdorf, at Nieman Marcus, at
21 Nordstrom's, at Saks Fifth Avenue.

22 So, in sum, Thom Browne and adidas, they're, again, on
23 different levels and different worlds, and they do not compete
24 for the same consumers. The consumers of Thom Browne's goods,
25 they pay a lot of attention to what they're doing. When they

N1CQadi3

Summation - Mr. Maldonado

1 go into his store and they in to buy a pair of sweatpants for a
2 thousand dollars, they're thinking about. They are paying
3 attention. They pay a lot of attention to detail, and they're
4 not likely to be confused.

5 Let's talk about the so-called evidence of actual
6 confusion. First, as I mentioned, and as you know, from the
7 time that Thom Browne started using four bars and Grosgrain,
8 through 2018, at least through that whole period, and I would
9 say even through today, there's no evidence that anyone was
10 ever confused. No one ever confused Thom Browne for adidas.
11 And a lot of witnesses were asked about that on the stand.
12 We'll go through their testimony. You'll recall witness after
13 witness after witness said have you known of any confusion?
14 No. No. No. No confusion. Adidas knows this, and they
15 put up a survey, a flawed survey. And I want to point out, and
16 the Judge will instruct you, that adidas bears the burden of
17 proof here. Thom Browne doesn't need to do a survey. Thom
18 Browne doesn't need to show that there was no confusion. If
19 adidas's survey is flawed, Thom Browne can decide how am I
20 going to respond? Am I not going to respond? There are things
21 that don't need responding to. So you shouldn't think just
22 because Thom Browne didn't run a survey, that adidas's survey
23 should be the end word on the matter. We'll talk about that
24 survey and what the problems are.

25 Adidas also presented Instagram comments, anonymous

N1CQadi3

Summation - Mr. Maldonado

1 Instagram comments. I think like five Instagram comments. And
2 they said, wow, that's confusion. People are really confused.
3 You can draw your own conclusions there, but let's take a look
4 here. Now, adidas talked about three times of confusion:
5 Initial interest confusion, point-of-sale confusion, post-sale
6 confusion. Now, most cases we looked first at point of sale
7 because that's where the harm is done. If someone is going
8 into a store, they're looking at your sweatpants. They're
9 looking at the other guy's sweatpants, deciding which one to
10 buy. That's where harm really occurs, when someone else buys
11 someone else's product thinking it's yours. That's called
12 point of sale.

13 Curiously, adidas did not do a point-of-sale confusion
14 survey because adidas knows that there's no confusion at the
15 point of sale. So, instead, adidas looked at initial interest
16 confusion, which there's no evidence of initial interest
17 confusion. There's no evidence of anyone going into a store or
18 flipping through their phone and saying, oh my God, Thom
19 Browne. I mean, that looks like adidas. Oh, Thom Browne, I'll
20 buy that instead. I'll buy the thousand dollar sweatpants
21 because I thought they were adidas. There's no evidence that
22 that has ever happened or that it ever will happen. Then they
23 looked at post sale, and that's Mr. Poret's survey, which we'll
24 talk about in a minute.

25 Actually, we'll talk about it now. So Mr. Poret, this

N1CQadi3

Summation - Mr. Maldonado

1 is adidas's consultant and survey artist. He did a survey,
2 which he calls a post-sale survey. But you'll remember his
3 testimony, and you'll remember the images that he used in his
4 survey, and those were not images taken in the real world. So
5 post-sale confusion is supposed to test confusion in a real
6 world environment. When you see pants on the street, when you
7 see them in the store, when you see them wherever, wherever
8 people are in life, that's what post-sale confusion is supposed
9 to test. Yet in his survey, he didn't use post-sale confusion
10 photos. He didn't use photos in the real world. He used
11 photos in an art studio. Photos in a photographer studio of
12 models with white backgrounds. Mr. Henn said he didn't want
13 you to be confused by trees and butterflies and things in the
14 background because then you wouldn't really focus on the
15 stripes. But that's the whole point. The whole point is what
16 do you see out on the street in the real world. What do you
17 pay attention to? What do you focus on?

18 Here we see the testimony of Mr. Poret, and he agrees,
19 we're comparing here, if you recall, on the left is adidas's
20 website, and on the right is an image that was used in
21 Mr. Poret's survey. By the way, the images in Mr. Poret's
22 survey came from adidas. Adidas provided the images. And it's
23 kind of funny how much they look like adidas images. You see
24 the similarities here. Mr. Poret testified, you know, I agree
25 they both have white backgrounds. It's a pretty standard

N1CQadi3

Summation - Mr. Maldonado

1 background for a clothing website, but, yes, they're both
2 essentially white.

3 Now, would you agree, he was asked, that adidas has
4 point-of-sale photos because photos on the website are
5 point-of-sale photos, that's where you make a purchase on the
6 website. He says, would you agree that adidas has
7 point-of-sale photos that look like post-sale photos. And he
8 says, yes, he admits there's similarities, and you could see
9 that for yourself. It's evidence.

10 Now, this is the testimony he had showing his
11 relationship with adidas. This isn't the first case that he's
12 testified in favor of adidas. There's been many, many cases
13 which Mr. Poret has design surveys for adidas.

14 This is the testimony where Mr. Poret says that he
15 admits he wasn't the photographer. He didn't take the photos.
16 And that he got the photos from adidas. And, again, if you
17 look at these photos and think about it and think about images
18 that you've seen of adidas, it's obvious to anyone that these
19 photos and these models were made to look like adidas, as close
20 to adidas as they could get. You don't see any models here as
21 is displayed on Thom Browne's website in a white button-down
22 shirt with sweatpants. You don't see that here. What do you
23 see? You see people in sports clothes. They mix and match
24 some of Thom Browne's clothes with other sports clothes and
25 T-shirts. They have athletic poses. You have the model

N1CQadi3

Summation - Mr. Maldonado

1 holding her arm like this to turn the horizontal stripes
2 vertical; you see that in the first image. So you have all
3 these images that were purposely taken and made to look as
4 close to adidas as they could. And that, ladies and gentlemen,
5 is a serious, serious flaw to this survey.

6 Again, this is a very good example. I mean, the other
7 ones were studio pictures of clothing that were taken by
8 adidas. This is actual image from Thom Browne's website.
9 Think about that. That's an image from Thom Browne's website.
10 That is point of sale. Thom Browne's website is where you go
11 to buy Thom Browne's products. They take the image from the
12 point of sale and they put it into their post-sale confusion
13 survey. You know why they do that? So that you can't see the
14 price. You can't see that it's on Thom Browne's website. You
15 can't see all the things that you would see in a normal
16 purchasing environment. It's stripped all that away, they take
17 the image and they put it in front of someone and they ask
18 questions. That, ladies and gentlemen, is not a post-sale
19 survey.

20 Another interesting thing. You saw images -- I mean,
21 Mr. Henn was really upset about some of the images that he put
22 on the screen that showed the Grosgrain on clothing down the
23 sleeve and down the leg, you might remember that? Funny thing
24 is Mr. Poret didn't test any of that clothing. Not a single
25 piece of clothing with Grosgrain was tested in the survey. The

N1CQadi3

Summation - Mr. Maldonado

1 only Grosgrain product that Mr. Poret tested was a sneaker. So
2 the clothing that is so outrageous and so close to adidas
3 wasn't even tested. Think about that.

4 As I mentioned to you earlier, it's been over a decade
5 of coexistence with no actual confusion. And you'll see here
6 on the screen the very first runway show Thom Browne in 2009
7 where the sweatpants with the four bars were debuted, right
8 here on the screen, 2009. We go through all these years, from
9 2009 through 2018, no confusion. People aren't confused. And
10 yet now adidas wants you to believe that there's a high
11 likelihood of confusion. There's no actual confusion. But
12 there's a high likelihood that people are now all of a sudden
13 going to start to be confused. They're not.

14 Social media. So we have Instagram posts, Instagram
15 comments that Mr. Henn put on the screen. Think about that
16 again. How many did he put up? How many are in evidence? How
17 many were shown to you? Just five. Five over 15 years. Just
18 five Instagram posts which allegedly show confusion. We don't
19 think they show confusion at all. Someone says adidas, does
20 that mean they're confused? No. What would adidas say?
21 That's not confusion. I mean, Who are these people anyway? We
22 don't know who they are. Many of you probably have Instagram,
23 and you look at posts, you don't know who says what, who these
24 people are, what they're saying, what they mean. We can't find
25 these people. Try to ask Instagram who that user is, they're

N1CQadi3

Summation - Mr. Maldonado

1 not going to tell you. Try to get a court order, that's is
2 going to be hard to get on its own. We don't know who the
3 people are. We don't know what they mean by what they say.
4 And, most importantly, this evidence is so minimal, so de
5 minimus that it does not prove actual confusion in no way,
6 shape or form.

7 Thom Browne's CEO, Mr. Bazan, testified about Thom
8 Browne's Instagram followers and Facebook follow years. And
9 Thom Browne has 190,000 Facebook followers, and has 1.3 million
10 Instagram followers. Lots of followers on Thom Browne's site.
11 No confusion. Mr. Bazan was asked he's been CEO since 2016.
12 "have you been aware of any reports of confusion between Thom
13 Browne and adidas?

14 "A. No."

15 Lucas Langellier, the VP of retail for Thom Browne, he
16 was also asked about confusion. He's in the store all the
17 time. He runs all the retail stores. He's in charge of them.

18 "Has anyone ever told you that your 4-Bar signature
19 product looked just like adidas?

20 "No. Nobody's ever said to me that it's confused Thom
21 Browne 4-Bar stripe with adidas." He's been in this company
22 for a long time. Ten years, more. No confusion.

23 "Has anyone told you that Grosgrain signature looks
24 like adidas's trademark?

25 "No.

N1CQadi3

Summation - Mr. Maldonado

1 "Has anyone confused the product?

2 "No." No reports of confusion for Mr. Langellier.

3 When adidas's witnesses were asked the same question,
4 we get the same responses. This is Chris Murphy again, VP of
5 brand marketing at adidas.

6 "At the time of your deposition, you testified that
7 you weren't aware of any customer complaints or reviews that
8 mentioned Thom Browne."

9 He said no.

10 "You had not seen any reviews or complaints where a
11 consumer had indicated to adidas that he or she was confused
12 between adidas and Thom Browne?

13 "No."

14 He doesn't know anything about confusion either. He's
15 been in that position a very long time.

16 Paul Bowyer, also testified, the VP of Originals,
17 asked similar questions. He's been at adidas since 2012, ten
18 years now, over a decade.

19 "During that time have you seen any quantitative or
20 qualitative data of confusion, any actual confusion?

21 "A. No."

22 No confusion. No evidence of confusion. Poret's
23 survey, not valid; flawed; does not show confusion.

24 Five Instagram posts. No. That doesn't do it.
25 There's no evidence of confusion.

N1CQadi3

Summation - Mr. Maldonado

1 Let's talk about the quality of the product. Now,
2 Mr. Henn told you the quality of the products are similar. One
3 thing funny is how many products did adidas bring into the
4 courtroom for this case? Zero. You haven't seen a single
5 adidas product in this case. Yet he wants you to believe that
6 the quality is similar.

7 Now, you have heard from Thom Browne's witnesses that
8 his products are undeniably high in quality, and you see here
9 the sweatpants here, you've seen here the sweatpants in front
10 of you, talked about the intarsia, how the stripes are woven
11 into the material, and, I mean, Mr. Henn suggested you can't
12 see that from far away. I think you can. I think if you look
13 over there at those products on the rack, you can see that
14 those are not sewn-on stripes. You can see that they're woven
15 into the fabric.

16 The other thing you can see, ladies and gentlemen,
17 from here, from across the room looking at the rack, those
18 clothes are expensive. That's an expensive rack of clothes.
19 You can tell that from across the room just looking at that
20 rack. You don't need to go up to the clothes. You don't need
21 to feel them.

22 Mr. Browne told you that Thom Browne has always aimed
23 for the highest quality in the clothing that he designs. He
24 wanted his clothing to have that true, American sensibility,
25 handmade clothing of the best quality.

N1CQadi3

Summation - Mr. Maldonado

1 Mr. Bazan also agreed about the quality of the
2 clothing. He talked about the highest raw materials, highest
3 quality fabric, about the attention to detail. Thom Browne's
4 products are of a superior quality.

5 Let's talk a little about bad faith. The Judge will
6 instruct you on bad faith. You heard about the inspiration for
7 Thom Browne's designs. He was inspired by the varsity sweater
8 as you see on the slide. And you've seen other images of
9 varsity sweaters during this litigation. Undeniably, varsity
10 sweaters, stripes on the left sleeve. Thom Browne bands on the
11 left sleeve. That was his inspiration. You're not going to
12 see anything from adidas that looks like that from this time
13 period. From last year you might see something, but not in
14 this time period.

15 November 2006, Mr. Browne opens his store in Tribeca.
16 We've all seen this article. We've heard a lot of testimony
17 about this. This was his first retail store in New York,
18 opened in 2006. At that time when this article came out,
19 Vanessa Backman got a copy of the article. She sends it to
20 Mr. Henn. This is on November 15, 2006, her outside counsel.
21 She sends him this article about Thom Browne and the store in
22 Tribeca. One week later, November 21, she sends it again to
23 Mr. Henn. She sends him the article again. This time the
24 picture of the sports coat with the three bars is circled. You
25 see the circling there and the arrow.

N1CQadi3

Summation - Mr. Maldonado

1 Now, Mr. Thomas Becker was the CEO of Thom Browne in
2 2007 when the dispute between adidas and Thom Browne first
3 started. He was there at the company, and he testified that
4 the change from three to four stripes was made because of
5 adidas. We all know that. That's the only reason that Thom
6 Browne stopped using the three stripes was because of adidas.
7 In good faith, to avoid a dispute, Thom Browne stopped his
8 three bars, changed to four bars, to avoid an IP dispute.

9 The images, the emails, this is email correspondence
10 that you've seen between Thom Browne and his factory. You saw
11 this email from Sam Lothrop to Lisa Wood at the Corgi factory
12 where they manufacture their knitwear. Mr. Lopthrop says in
13 this email, "We're changing our stripe layout for the left
14 sleeve before adidas sues our short pants off."

15 Ladies and gentlemen, there's no question that Thom
16 Browne made this change because of adidas. He did so in good
17 faith. There is no bad faith. No evidence of bad faith here.

18 Mr. Becker also told you that he tried to follow up
19 with Ms. Backman. He tried to call her. He wanted to tell her
20 that they're changing to four bars. He wasn't able to reach
21 her. He couldn't get in touch with her, but he tried, and that
22 was his undisputed testimony. She never returned his calls.
23 They never spoke, but he did try. They acted in good faith at
24 all times.

25 Robert Childs, again, he told you will about the

N1CQadi3

Summation - Mr. Maldonado

1 designer sweatpants.

2 Now, adidas complains about compression pants. I'm
3 not sure if they're really complaining about the sweatpants,
4 although the charge was infringement, but what was in Thom
5 Browne, the company, what was in their mind when they were
6 coming out with sweatpants? Mr. Childs told you about that.
7 He said they wanted to design something that the customers
8 could wear to work. They could wear on the weekends when
9 they're lounging. It's just a natural progression of the
10 development of their line of clothing. That's what the
11 sweatpants were. They wanted something that the customers
12 could wear on weekends.

13 And so we see through this period of time -- and again
14 this goes to Thom Browne's good faith -- you see evidence. You
15 see lots of images from fashion shows from 2008 through 2018.
16 I will go through some of these, and you will see throughout
17 the years, throughout all these years Thom Browne has been
18 selling items of clothing, including sweaters and casual wear
19 with four bars and with the Grosgrain signature. You'll see it
20 throughout this collection.

21 Mr. Henn tried to create some kind of timeline like
22 Thom Browne just started using Grosgrain in a decorative way or
23 they're changing the way that they're using their signatures.
24 Interestingly enough, his timeline doesn't have any dates on
25 it. So you don't know when any of this actually happened. The

N1CQadi3

Summation - Mr. Maldonado

1 truth is that it all happened a long time ago; that Thom Browne
2 has been using Grosgrain decoratively in his clothing,
3 Mr. Childs testified, since the beginning, since he started
4 there in 2007. It's not something new. It's not some
5 progression to change the look of Thom Browne's clothing to
6 look more like adidas. That's not happening.

7 Now, we heard testimony from Ms. Vanderhoff. You
8 know, we're trying to figure out what was the delay. We had
9 Ms. Backman testify that she knew about Thom Browne in 2007.
10 We know she reached out. Then there was nothing until 2018.
11 What happened in the interim? Ms. Vanderhoff testified she
12 didn't know about Thom Browne, and yet, we also heard testimony
13 from her that before she joined adidas, she worked with
14 Mr. Henn at Kilpatrick. And she worked mostly on adidas
15 matters. This was back in 2005. She said that she didn't know
16 about Thom Browne until 2018, but then there was a privilege
17 log, there was an entry, and you saw the testimony about this,
18 that in 2006, Ms. Vanderhoff, who back then was known as Sara
19 Maurer, she sent an email to Charlie Henn. In 2006 she sent an
20 email to Charlie Henn. What's the subject? Potential claims
21 against Thom Browne. Ms. Vanderhoff was working on Thom Browne
22 matters when she was an associate at Kilpatrick in 2006. She
23 was working on the very matter that was the predecessor to this
24 lawsuit. Yet, she told you she didn't even know about Thom
25 Browne until 2018. Ladies and gentlemen, that affects her

N1CQadi3

Summation - Mr. Maldonado

1 credibility, as you consider her testimony and all the matters
2 that she testified about at this trial.

3 Let's look at this slide. That's one of the images
4 that adidas loves. They love that image on the right of the
5 model on the track in her compression wear. Ladies and
6 gentlemen, it's a stretch to think that this image means that
7 Thom Browne changed his whole business, everything he's built
8 over his whole career to look like adidas. That's what they
9 want you to believe, because of that one image on Facebook.

10 We also saw the Dan Levy video, and you all enjoyed
11 that, I'm sure. Dan Levy is there in his Thom Browne sweat
12 suit. He's not stretching. He's not exercising. He's
13 drinking a milkshake or maybe it's a pina colada, who knows,
14 but he is certainly not exercising in his Thom Browne clothes.
15 This whole idea that Thom Browne wants to be a sportswear
16 athletic company is just not true.

17 Now you saw corporate board meeting minutes that went
18 on the board talking about sportswear, how they're going to
19 grow the sportswear business. Yet, keep in mind as the
20 witnesses testified, as the documents show, what do they mean
21 by that? Sportswear within the Thom Browne company means
22 anything that's not tailored. So they're trying to grow the
23 non-tailored portion of their business: The knits, the polo
24 shirts, various items Mr. Bazan talked about in his emails.
25 They weren't talking about performance athletic wear. There

N1CQadi3

Summation - Mr. Maldonado

1 was one email that talked about expanding compression wear into
2 bags and shoes. You heard testimony that never happened.
3 There's been no expansion into adidas's realm.

4 So, ladies and gentlemen, that's the last fact that
5 you need to consider when you're deciding likelihood of
6 confusion. As you go through all of these factors, you should
7 come to the conclusion that there is no likelihood of confusion
8 here. Again, this case isn't about confusion. It isn't about
9 competition. It's about whether adidas can own all stripes.

10 Now, there's another claim in case for dilution that
11 the Judge will instruct you about. And one of the questions
12 that you need to decide is whether the Three-Stripe Mark is
13 famous. Now, as the Judge will instruct you, you need to
14 decide the Three-Stripe Mark was famous at the time that Thom
15 Browne adopted his Grosgrain and at the time that Thom Browne
16 adopted the four bars. Those are the two signatures that are
17 accused of infringement here. And you see here on the left,
18 you've see in this trademark registration. Thom Browne owns
19 the trademark registration for his Grosgrain, for clothing.
20 You see that here on the left. It cites a date of first use in
21 2004. So we know that Thom Browne has been using the Grosgrain
22 since at least 2004. Adidas has to prove that its Three-Stripe
23 Mark was famous at least as of 204 with respect to dilution
24 claim against the Grosgrain. With respect to its dilution
25 claim against the four bars, adidas has to show that its

N1CQadi3

Summation - Mr. Maldonado

1 Three-Stripe Mark, however that is defined, was famous as of
2 2008. Those are the critical dates for dilution.

3 What's the evidence? There is none. First of all,
4 there's no evidence about fame of three horizontal stripes. So
5 any alleged evidence that adidas will rely on regarding fame
6 would be as to its trademark registrations perhaps or as to
7 vertical stripes. You're not going to see any evidence
8 relating to fame of horizontal stripes. As I told you earlier
9 and as you saw the evidence, there is very scant evidence that
10 adidas has even used horizontal stripes.

11 You have here testimony from Tom Kahl, the senior
12 manager of finance at adidas. He talked about the data that he
13 considered, the sales data that he considered, or that are
14 presented in his sales report, rather. He says there was no
15 sales presented prior to 2012. No sales data prior to 2012.
16 Dilution has to be as of 2002, 2004 or 2008. They have no
17 sales data prior to those periods. Because the systems don't
18 have that data. So the sales data, as you'll see in this
19 slide, is from 2012 forward. There's no pre-2012 sales data.
20 No data to support fame for purposes of dilution.

21 Now if we talk about advertising and marketing data.
22 You'll see here in this slide, if you look at Plaintiff's
23 Exhibit 72, which they rely upon, it doesn't have any data
24 prior to 2010. Marketing advertising spends no data prior to
25 2012. So, again, here, if we use 2012 as the date for

N1CQadi3

Summation - Mr. Maldonado

1 marketing and sales data, that's supposedly is going to show
2 that the Three-Stripe Mark is famous, nothing prior to 2008.
3 There is no data that's going to support their claim of
4 dilution.

5 Catalogs. Adidas has relied on many catalogs, but
6 catalogs are not evidence of fame. Catalogs are sent to
7 wholesale buyers. They are not sent to consumers. They're
8 sent to buyers of stores. They can't rely on catalogs to show
9 fame.

10 So, ladies and gentlemen, there is no evidence in this
11 record that the Three-Stripe Mark was famous prior to 2008.
12 That alone is reason enough for you to deny the dilution claim.

13 Interestingly enough, adidas survey artist, Hal Poret,
14 he didn't conduct a survey on fame. Survey experts often will
15 conduct surveys to support claims of dilution. In this case,
16 there's no survey by Mr. Poret. Mr. Joachimsthaler, who you
17 heard from, he conducted a survey, but it wasn't a fame survey.
18 He says it was a recognition survey. We asked him, did you do
19 a fame survey? He said no. It's definitely not a fame survey.
20 No survey evidence of fame.

21 Ladies and gentlemen, one of the things you should
22 think about throughout your evaluation of the testimony and as
23 you come to your conclusion is how has adidas been harmed by
24 any of this? And you will see, there is no harm. There's been
25 no harm. There's no evidence of harm. There's no evidence

N1CQadi3

Summation - Mr. Maldonado

1 that adidas has been harmed by anything that Thom Browne has
2 done.

3 We talked about confusion. They had their confusion
4 survey. As we mention, there is initial interest, there is
5 post sale. We put those around the side there because really
6 the important thing about confusion is the middle there, the
7 point of sale. Adidas's evidence misses the mark.

8 Now the only evidence that they tried to put in on
9 harm is Dr. Joachimsthaler. Now I'm sure you were all
10 scintillated by his testimony about your brain and the little
11 nodules in your brain, and you probably didn't know there was a
12 compartment in your brain where adidas sits. They have all
13 these theories about the brain and what's going on in the brain
14 to try to manufacture a theory of harm. But it's all
15 theoretical. There's no empirical evidence. He didn't do any
16 studies. He didn't put anything in front of you that shows
17 adidas was harmed. He just comes up with theoretical
18 possibilities that he knows as a scholar because he's very
19 intelligent in these matters, and so he tells you what scholars
20 think about what's going on in your brain, but no real evidence
21 of harm. Just think as a practical matter, is adidas being
22 harmed by Thom Browne? You can even answer that at that level,
23 ladies and gentlemen.

24 As you know here, he says, he talks about different
25 lifestyles, and he admits that Thom Browne is luxury. Adidas

N1CQadi3

Summation - Mr. Maldonado

1 is for everyone. He knows about the difference. He knows
2 they're not competitors. Adidas and Thom Browne don't compete
3 for the same business.

4 Remember that chart at the bottom there? That
5 confusing chart with all the circles and the overlapping
6 circles, and I don't know what that means, but he put that
7 chart up on the screen and he said this is harm. This shows
8 harm. The little circles, adidas and Thom Browne, I don't
9 know, somehow that's harm.

10 Mr. Steckel came up. He is a professor of marketing
11 at NYU. He testified and told you, he's an expert, he is a
12 specialized witness, and he told you, my overall conclusion is
13 that his opinions, Dr. Joachimsthaler's opinions lack
14 scientific basis. They're not grounded -- they are grounded on
15 baseless and incorrect assumptions and a lot of speculation.
16 To put it simply, his report was a lot of complicated
17 hand-waving as opposed to scientific investigations.

18 No harm here, ladies and gentlemen. No damages.
19 Adidas is going to ask you to find Thom Browne liable and to
20 award them, I don't know, 7 million plus dollars in damages?
21 Ladies and gentlemen, in order to award damages, you need to
22 find that adidas was harmed. Adidas was not harmed. The
23 damages, if there is liability, and we don't think that there
24 is, and we hope that you agree with us -- zero.

25 Ladies and gentlemen, at the conclusion of this case,

N1CQadi3

Summation - Mr. Maldonado

1 and we're just about over. Five minutes left. Can you
2 imagine? At the conclusion of this case, we're going to take a
3 break. The Judge will instruct you on the law. Then you are
4 going to go back to deliberate, and the Judge will hand you
5 this verdict form. The verdict form will ask you on the claim
6 of trademark infringement, we, the jury, find the defendant
7 Thom Browne -- you should check the right box -- not liable for
8 trademark infringement. If you check that box, you don't have
9 to answer 2 or 3. You don't have to put in any dollar amounts
10 in those two questions.

11 Then you skip to the fourth question. Again the
12 question is: On adidas's claim for trademark dilution, we, the
13 jury, find the defendant Thom Browne, not liable. And that's
14 it. And then your work is done. You can go home. You can go
15 back to your lives, back to your families, back to your jobs.
16 and we're done.

17 So thank you all for your time, for your patience, for
18 your attention, and, please, vote as you should: That Thom
19 Browne is not liable. Thank you.

20 THE COURT: Thank you very much.

21 All right, ladies and gentlemen. We will take our
22 lunch break now. So we will resume at 1:30.

23 (Jury not present)

24 THE COURT: Please be seated. It's going to sound
25 like a broken record, but I continue to be very impressed by

N1CQadi3

Summation - Mr. Maldonado

1 the quality of lawyering in this case, and I want to express my
2 great thanks to all the counsel for their really excellent
3 work. It's a case that has many interesting facets that now
4 will be for the jury as soon as I give them instructions of
5 law.

6 Now I couldn't help but think when we were hearing
7 about various marks of what undoubtedly are the most famous
8 marks; namely the Marx brothers. And so my trivia question for
9 counsel is: How many Marx brothers were there?

10 You're saying four? Can you name them?

11 MR. LEWIN: Harpo, Groucho. I'm forgetting the order
12 on the last two --

13 THE COURT: My courtroom deputy --

14 DEPUTY CLERK: Chico, Zeppo.

15 THE COURT: Technically, you could make an argument
16 that there were four. There were actually five. But one of
17 them named Gummo only appeared on stage and never appeared in
18 the movies. But you knew that, of course.

19 So, whether it's three stripes, four stripes in the
20 case of the Marx brothers, it was five strikes. And, by the
21 way, their stock in trade was confusion. See you in an hour.

22 THE COURT: I'm sorry, are the exhibits all ready?

23 MR. HENN: There's an issue that we just need to put
24 something on the record at the court reporter's request, but
25 they are ready.

N1CsADI4

Jury Charge

1 THE COURT: We'll do that once we come back.

2 (Luncheon recess)

3 AFTERNOON SESSION

4 1:30 p.m.

5 (Jury not present)

6 THE COURT: There was something plaintiff's counsel
7 wanted to put on about exhibits.

8 MR. HENN: Yes, your Honor.

9 In finalizing the exhibits, we realized there was a
10 handful where there was no objection, it was presented to the
11 witness and the jury, but your Honor didn't say the magic words
12 received.

13 THE COURT: But that's because I said it earlier, and
14 I don't know if you found this, that where the parties had
15 stipulated, in effect, to the admission, they were
16 automatically received. So those were received, in fact, even
17 though I didn't say it at that time.

18 MR. HENN: Thank you.

19 Do you mind if I just read them for clarity sake?

20 THE COURT: Go ahead.

21 MR. HENN: The exhibits referring to, these are all
22 plaintiff's exhibits, 50, 80, 81, 82, 86, 196, 1008, 1030,
23 1307, and 1309.

24 (Plaintiff's Exhibits 50, 80, 81, 82, 86, 196, 1008,
25 1030, 1307, and 1309 received in evidence)

N1CsADI4

Jury Charge

1 THE COURT: OK. And now so that they can go into the
2 jury room as soon as we finish with the instructions, where are
3 the exhibits?

4 They are in those various boxes on both sides?

5 So did you bring the crane?

6 Now we know what needs to be brought in and now the
7 CSO officer can help with that.

8 Yes.

9 MR. MALDONADO: Your Honor, we want to read a couple
10 of transcript corrections into the record.

11 THE COURT: Go ahead.

12 MR. MALDONADO: At page 401, line 12, 0820 should be
13 0082 and 0120 should be 0102. And then at page 401, line 20,
14 39 should be 139.

15 THE COURT: Very good.

16 MR. MALDONADO: Thank you, your Honor.

17 THE COURT: All right.

18 (Jury present)

19 Ladies and gentlemen, you each have a copy now of my
20 instructions of law. I'm going to read them together now.
21 You'll be able to take them with you into the jury room as well
22 to refer to them during your deliberations.

23 If you look at the table of contents on the second
24 page, you'll see that first there are some general
25 instructions. These are instructions that apply basically to

N1CsADI4

Jury Charge

1 all civil cases.

2 Then there's instructions under the heading liability.
3 These are about the two claims in this case: Infringement and
4 dilution.

5 Then if you find liability on infringement, then you
6 need to determine damages, which is just the lawyer's word for
7 money, so there is some instructions there in the third section
8 about that.

9 Finally, there is some concluding instructions about
10 how you fill out your verdict form and things like that sort.

11 So let's begin on page three with instruction number
12 one.

13 We are now approaching the most important part of this
14 case, your deliberations. You have heard all of the evidence
15 in the case, as well as the final arguments of the lawyers for
16 the parties. Before you retire to deliberate, it is my duty to
17 instruct you as to the law that will govern your deliberations.
18 These are the final and binding instructions, which entirely
19 replace the preliminary instruction I gave you at the start of
20 the case, which you should now discard.

21 Regardless of any opinion that you may have as to what
22 the law may be or ought to be, it is your sworn duty to follow
23 the law as I give it to you. Also, if any attorney or other
24 person has stated a legal principle different from any that I
25 state to you in my instructions, it is my instructions that you

N1CsADI4

Jury Charge

1 must follow.

2 Because my instructions cover many points, I have
3 provided each of you with a copy of them, not only so that you
4 can follow them as I read them to you now, but also so that you
5 can have them with you for the reference throughout your
6 deliberations. In listening to them now and reviewing them
7 later, you should not single out any particular instruction as
8 alone stating the law, but you should instead consider my
9 instructions as a whole.

10 Your duty is to decide the fact issues in the case and
11 arrive, if you can, at a verdict. You, the members of the
12 jury, are the sole and exclusive judges of the facts. You pass
13 upon the weight of the evidence; you determine the credibility
14 of the witnesses; you resolve such conflicts as there may be in
15 the testimony; and you draw whatever reasonable inferences you
16 decide to draw from the facts as you determine them.

17 In determining the facts, you must rely upon your own
18 recollection of the evidence. To aid your recollection, we
19 will send you the exhibits at the start of your deliberations,
20 together with an index to help you find what you want. If you
21 need to review particular items of testimony, we can also
22 arrange to provide them to you in transcript or read-back form.

23 Please remember that none of what the lawyers have
24 said in their opening statements, in their closing arguments,
25 in their objections, or in their questions is evidence. Nor is

N1CsADI4

Jury Charge

1 anything I may have said evidence. The evidence before you,
2 consists of just three things: The testimony given by
3 witnesses that was received in evidence, the exhibits that were
4 received in evidence, and any stipulations of the parties as to
5 matters in evidence.

6 Testimony consists of the answers that were given by
7 the witnesses to the questions that were permitted to be asked
8 here in court. Please remember that questions, although they
9 may provide the context for the answers, are not themselves
10 evidence, only answers are evidence, and you should therefore
11 disregard any question to which I sustained an objection.
12 Also, you may not consider any answer that I directed you to
13 disregard or that I directed be stricken from the record.
14 Likewise, you may not consider anything you heard about the
15 contents of any exhibit that was not received in evidence.

16 More generally, you should be careful not to speculate
17 about matters not in evidence. Your focus should be solely on
18 the evidence that was presented here in court.

19 It is the duty of the attorney for each side of a case
20 to object when the other side offers testimony or other
21 evidence that the attorney believes is not properly admissible.
22 Counsel also have the right and duty to ask the court to make
23 rulings of law and to request conferences out of the hearing of
24 the jury. All such questions of law must be decided by me.
25 You should not show any prejudice against any attorney or party

N1CsADI4

Jury Charge

1 because the attorney objected to the admissibility of evidence,
2 asked for a conference out of the hearing of the jury, or asked
3 me for a ruling on the law.

4 I also ask you to draw no inference from my rulings or
5 from the fact that on occasion I asked questions of certain
6 witnesses. My rulings were no more than applications of the
7 law and my questions were only intended for clarification or to
8 expedite matters. You should understand this, I have no
9 opinion as to the verdict you should render in this case.

10 You are to perform your duty of finding the facts
11 without bias or prejudice or sympathy or hostility as to any
12 party, for all parties are equal under the law. You are to
13 perform your final duty in an attitude of complete fairness and
14 impartiality. You are not to be swayed by rhetoric or
15 emotional appeals. It must be clear to you that if you were to
16 let extraneous considerations interfere with your thinking,
17 there would be a risk that you would not arrive at a true and
18 just verdict. So do not be guided by anything except clear
19 thinking and calm analysis of the evidence.

20 As you know, this is a civil case. In a civil case, a
21 party who is making a claim against another party has what we
22 call the burden of proof, which is the burden of establishing
23 each of the essential elements of that claim. Here, adidas has
24 asserted claims of trademark infringement and dilution against
25 Thom Browne, and therefore has the burden of proof as to those

N1CsADI4

Jury Charge

1 claims.

2 I will describe the essential elements of adidas' claims shortly, but for now, keep in mind that adidas must prove each of the essential elements of each of its claims by a preponderance of the credible evidence. Credible evidence means such evidence that you find worthy of belief. To establish an element of a claim by a preponderance of the credible evidence means to prove that that element is more likely true than not true.

10 When assessing whether a party has met its burden of proof or failed to do so, the question is not which party called the greater number of witnesses or how much time one party or another spent during the trial. The focus must always be on the quality of the evidence: Its persuasiveness in convincing you of its truth.

16 In deciding whether a party meets its burden of proof, you may consider both direct evidence and circumstantial evidence.

19 Direct evidence is evidence that proves a fact directly. For example, where a witness testifies to what he or she saw, heard, or observed, that is called direct evidence.

22 Circumstantial evidence is evidence that tends to prove a fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day, but the courtroom

N1CsADI4

Jury Charge

1 blinds were drawn and you could not look outside. Later, as
2 you were sitting here, someone walked in with a dripping wet
3 umbrella, and soon after somebody else walked in with a
4 dripping wet raincoat. Now, on our assume facts, you cannot
5 look outside the courtroom and you cannot see whether it is
6 raining, so you have no direct evidence of that fact. But on
7 the combination of the facts about the umbrella and the
8 raincoat, it would be reasonable for you to infer that it had
9 begun raining.

10 That is all there is to circumstantial evidence.
11 Using your reason and experience, you infer from established
12 facts the existence or nonexistence of some other fact. Please
13 note, however, that it is not a matter of speculation or guess;
14 it is a matter of logical inference.

15 The law makes no distinction between direct and
16 circumstantial evidence. Circumstantial evidence is of no less
17 value than direct evidence, and you may consider either/or
18 both, and may give them such weight as you conclude is
19 warranted.

20 It must be clear to you by now that counsel for the
21 opposing parties are asking you to draw very different
22 conclusions about various factual issues in the case. An
23 important part of that decision will involve making judgments
24 about the testimony of the witnesses you have listened to and
25 observed. In making these judgments, you should carefully

N1CsADI4

Jury Charge

1 scrutinize all of the testimony of each witness, the
2 circumstances under which each witness testified, and any other
3 matter in evidence that may help you to decide the truth and
4 the importance of each witness's testimony.

5 Your decision to believe or to not believe a witness
6 may depend on how that witness impressed you. How did that
7 witness appear to you? Was the witness candid, frank, and
8 forthright, or did the witness seem to be evasive or suspect in
9 some way? How did the way the witness testified on direct
10 examination compare with how the witness testified on
11 cross-examination? Was the witness consistent or
12 contradictory? Did the witness appear to know what he or she
13 was talking about? Did the witness strike you as someone who
14 was trying to report his or her knowledge accurately? These
15 are examples of the kinds of common-sense questions you should
16 ask yourselves in deciding whether a witness is or is not
17 truthful.

18 How much you choose to believe a witness may also be
19 influenced by the witness's bias. Does the witness have a
20 relationship with any of the parties that may affect how he or
21 she testified? Does the witness have some interest, incentive,
22 loyalty, or motive that might cause him or her to shade the
23 truth? Does the witness have some bias, prejudice, or
24 hostility that may cause the witness to give you something
25 other than a completely accurate account of the facts he or she

N1CsADI4

Jury Charge

1 testified to?

2 You should also consider whether the witness had an
3 opportunity to observe the facts he or she testified about, and
4 whether the witness's recollection of the facts stands up in
5 light of the other evidence in the case.

6 In other words, what you must try to do in deciding
7 credibility is to size up a person just as you would in any
8 important matter where you are trying to decide if a person is
9 truthful, straightforward, and accurate in his or her
10 recollection.

11 Some of the testimony before you is in the form of
12 excerpts from the depositions that were received in evidence.
13 A deposition is simply a procedure whereby prior to trial the
14 attorneys may question a witness or a party under oath before a
15 court stenographer. You should consider the deposition
16 received for trial according to the same standards you would
17 use to evaluate the testimony of a witness given live in court.

18 The law permits parties to offer testimony from
19 witnesses who were not involved in the underlying events in the
20 case, but who by education or experience profess to expertise
21 in a specialized area of knowledge. In this case, the expert
22 witnesses who testified were Hal Poret, Erich Joachimsthaler,
23 and John Plumpe called by adidas, and Joanne Arbuckle, Joel
24 Steckel, and Basil Imburgia called by Thom Browne. Specialized
25 testimony is presented to you on the theory that someone who is

N1CsADI4

Jury Charge

1 learned in the field may be able to assist you in understanding
2 specialized aspects of the evidence.

3 However, your role in judging credibility and
4 assessing weight applies just as much to these witnesses as to
5 other witnesses. When you consider the specialized opinions
6 that were received in evidence in this case, you may give them
7 as much or as little weight as you think they deserve. For
8 example, a specialized witness necessarily bases his or her
9 opinions, in part or in whole, on what that witness learned
10 from others, and you may conclude that the weight given the
11 witness's opinions may be affected by how accurate or
12 inaccurate an underlying information is. More generally, if
13 you find that the opinions of a specialized witness were not
14 based on sufficient data, education, or experience, or if you
15 should conclude that the trustworthiness or credibility of such
16 a witness is questionable, or if the opinion of the witness is
17 outweighed, in your judgment, by other evidence in the case,
18 then you may, if you wish, disregard the opinions of that
19 witness entirely or in part. On the other hand, if you find
20 that a specialized witness is credible, and that witness's
21 opinions are based on sufficient data, education, and
22 experience, and that the other evidence does not give you
23 reason to doubt the witness's conclusions, you may, if you
24 wish, rely on that witness's opinions and give them whatever
25 weight you deem appropriate.

N1CsADI4

Jury Charge

1 With these general instructions in mind, let me now
2 turn to the two claims in this case that the plaintiffs, adidas
3 America Inc., and adidas A.G. (collectively referred to as
4 adidas) bring against Thom Browne, Inc.: A claim of trademark
5 infringement and a claim of trademark dilution.

6 I will shortly instruct you on each of the essential
7 elements that adidas must prove, by a preponderance of the
8 evidence, to prevail on a given claim. This is known as
9 establishing liability. If adidas has failed to prove any
10 essential element of a particular claim by a preponderance of
11 the evidence, you must find Thom Browne not liable on that
12 claim. By contrast, if you find that adidas has proven by a
13 preponderance of the evidence every essential element of a
14 particular claim, then you should find Thom Browne liable on
15 that claim.

16 Before we turn to adidas' claims, a word about the
17 trademark at issue. A trademark can be a word, name, symbol,
18 or design that indicates to consumers the company associated
19 with a product. Here, adidas asserts infringement and dilution
20 of what it calls the Three-Stripe Mark. For purposes of this
21 case, adidas' Three-Stripe Mark means its use of three parallel
22 stripes on clothing or shoes in the manner described and
23 exemplified in a number of federal trademark registrations that
24 you can review at Plaintiff's Exhibit 181 and 183. It also
25 includes any other use by adidas of three parallel stripes on

N1CsADI4

Jury Charge

1 clothing or shoes that you find gives consumers the same
2 commercial impression as any one or more of the registered
3 uses. By this, I mean that you may find that a particular use
4 of three parallel stripes by adidas falls under its
5 Three-Stripe Mark -- even if it differs in some way from the
6 use of three stripes in any of the federal registrations -- if
7 you find that the use would be perceived in the same way by a
8 reasonable consumer.

9 Adidas asserts that Thom Browne has infringed adidas'
10 Three-Stripe Mark through Thom Browne's use of two branding
11 designs called the Four Bar and Grosgrain designs on specific
12 Thom Browne products. You can review the specific Thom Browne
13 products that adidas accuses of infringement at Plaintiff's
14 Exhibits 55 and 56 (collectively referred to as the accused
15 products).

16 Adidas contends that Thom Browne's use of the Four Bar
17 and Grosgrain designs on the accused products is likely to
18 confuse consumers into thinking that the products are made and
19 sold or otherwise connected with, associated with, sponsored
20 by, or approved by adidas. As you heard, adidas does not
21 contend that this confusion occurs at the point-of-sale of Thom
22 Browne products, but rather either presale (such as when
23 consumers first see a product in stores, online, or on social
24 media), or post-sale (as when consumers other than the Thom
25 Browne customers see these customers wearing the accused

N1CsADI4

Jury Charge

1 products).

2 In determining whether consumers, at either of these
3 points in time, are likely to be confused, you may draw on your
4 own common experience. You should also take into consideration
5 the following factors:

6 First, the strength of adidas' Three-Stripe Mark. A
7 mark's strength is measured by its tendency to identify the
8 products sold under the mark as associated with a particular
9 company and may depend on factors, such as advertising, media
10 coverage of products bearing the mark, sales success, the
11 longevity and exclusivity of the mark's use, consumer studies
12 linking the mark to the company, and any other factor in
13 evidence that you find bears on the strength of the mark. The
14 stronger the mark, the more likely that similar uses by other
15 parties will cause confusion.

16 Second, the degree of similarity between adidas'
17 Three-Stripe Mark and Thom Browne's use of the Four Bar and/or
18 Grosgrain designs on the accused products. In particular, you
19 should consider what effect the similarity or lack thereof has
20 on consumers and whether any similarity between the parties'
21 designs is likely to cause confusion among consumers.

22 Third, whether the accused products and adidas
23 products compete for the same consumers.

24 Fourth, whether or not there is evidence that
25 consumers are actually confused about which company offers the

N1CsADI4

Jury Charge

1 accused products. While proof of actual confusion is not
2 necessary to prove trademark infringement, and it is enough for
3 plaintiffs to show likelihood of confusion, evidence of actual
4 confusion can weigh in favor of there being a likelihood of
5 confusion. Conversely, the absence of evidence of actual
6 confusion can be evidence that confusion is unlikely. Please
7 remember that adidas is only claiming confusion at the pre-sale
8 and post-sale points, and that its survey is limited to
9 post-sale.

10 Fifth, the quality of the accused products relative to
11 adidas' products bearing the Three-Stripe Mark. If the
12 products are of similar quality, confusion may be more likely,
13 whereas if they are different quality, confusion is less
14 likely.

15 Sixth, the degree of care and attention that an
16 ordinary consumer would use when encountering adidas' and Thom
17 Browne's respective products. Generally, the more
18 sophisticated and careful the average consumer of a product is,
19 the less likely that that consumer will be confused about the
20 company behind the product.

21 Seventh, whether adidas has shown that Thom Browne
22 acted in bad faith. In this context, bad faith goes to whether
23 Thom Browne used the Four Bar and Grosgrain designs on the
24 accused products within with the intention that consumers would
25 associate their products with adidas' Three-Stripe Mark so as

N1CsADI4

Jury Charge

1 to profit from adidas' reputation, or whether Thom Browne chose
2 to purposely turn a blind eye to the high likelihood that
3 consumers would be confused.

4 In considering the factors I just described to you,
5 please keep in mind that no one factor or consideration is
6 conclusive, but each of these factors, as well as any other
7 factors you find relevant, should be weighed in light of the
8 total evidence presented at the trial to determine whether, on
9 balance, a likelihood of confusion exists. If adidas has
10 proved that a likelihood of confusion exists, it has then
11 carried its burden of proof on its infringement claim.

12 Adidas also asserts a claim for trademark dilution
13 under federal law. This claim does not require showing that
14 consumers are likely to be confused about the source of the
15 accused products. Instead, they require showing that Thom
16 Browne's designs on the accused products are likely to dilute
17 the distinctiveness of adidas' Three-Stripe Mark by eroding its
18 distinctiveness in the mind of the public.

19 To prove dilution under federal law, adidas must show
20 by a preponderance of the credible evidence that:

21 One, adidas' Three-Stripe Mark is famous;

22 Two, adidas' Three-Stripe Mark became famous before
23 Thom Browne first sold any of the accused products; and

24 Three, Thom Browne's use of its Four Bar and Grosgrain
25 designs on the accused products is likely to dilute the

N1CsADI4

Jury Charge

distinctiveness of adidas' mark.

The Three-Stripe Mark is famous if it is widely recognized by the general consuming public as designating adidas as the source of goods bearing the mark. In measuring fame, you may consider your own experience, as well as the extent, history, and geographic reach of advertising and publicity of the mark (both by adidas or third parties), the amount, volume, and geographic reach of sales of products bearing the mark, the extent to which members of the public actually recognize the mark, and whether the mark was federally registered. Here, as described above, the Three-Stripe Mark consists of several specific federal registrations that you can review at Plaintiff's Exhibits 181 and 183, as well as any uses you find to create the same commercial impression.

If you determine adidas' Three-Stripe Mark is famous and has been famous since before Thom Browne began selling the accused products, you must consider whether Thom Browne's use of the Four Bar and Grosgrain designs on the accused products is likely to dilute the distinctiveness of the Three-Stripe Mark. In determining whether such dilution is likely to occur, you may consider all relevant factors, including, for example:

The degree to which Thom Browne's use of the Four Bar and/or Grosgrain designs on the accused products is similar to adidas' use of the Three-Stripe Mark;

The strength of adidas' Three-Stripe Mark, which you

N1CsADI4

Jury Charge

1 should evaluate as described in Instruction 11;

2 The degree to which adidas' Three-Stripe Mark is
3 widely recognized;

4 Whether Thom Browne intended to create an association
5 with adidas' Three-Stripe Mark;

6 The extent to which other producers of similar goods
7 are using three stripes;

8 Any actual association by consumers of Thom Browne's
9 Four Bar and/or Grosgrain designs with adidas' Three-Stripe
10 Mark.

11 You may also consider any other relevant factors, and
12 you should remember that no one of these factors is conclusive.
13 Your task is to consider whether, after considering these
14 factors and any others that you find relevant, Thom Browne's
15 use of its Four Bar and/or Grosgrain designs on the accused
16 products is more likely than not to dilute the distinctiveness
17 of adidas' Three-Stripe Mark.

18 If you find Thom Browne liable for trademark
19 infringement, you must also determine the amount of money to
20 award to adidas. There are two possible components of such an
21 award:

22 One, any actual damages suffered by adidas, and

23 Two, the profits Thom Browne earned by selling any of
24 the accused products you determine infringed adidas'
25 Three-Stripe Mark.

N1CsADI4

Jury Charge

1 Please note that this does not apply to dilution
2 (where no monetary damages are claimed), but only to
3 infringement.

4 Actual damages means the amount of money necessary to
5 compensate adidas for harm directly caused by any infringement
6 by Thom Browne. You may decline to award any actual damages if
7 you find adidas was not harmed by any infringement by Thom
8 Browne.

9 Adidas does not claim that it lost sales as a result
10 of any infringement by Thom Browne; rather, it contends that if
11 Thom Browne had wanted to use its designs without infringing on
12 adidas' Three-Stripe Mark, it would have had to enter into a
13 licensing agreement with adidas. Accordingly, adidas contends
14 that its actual damages are measured by the royalties that
15 Thom Browne would have paid to adidas under such a licensing
16 agreement. The parties are agreed that you should calculate
17 such damages using a royalty fee equal to 8 percent of
18 wholesale sales and 3.1 percent of retail and e-commerce sales
19 of any of the accused products you find have infringed adidas'
20 Three-Stripe Mark.

21 If you find Thom Browne liable for trademark
22 infringement, you may also award adidas the profits you
23 determine Thom Browne earned as a result of its infringement.
24 You should measure such profits as the difference between Thom
25 Browne's total sales of any accused products you determine to

N1CsADI4

Jury Charge

1 have infringed adidas' Three-Stripe Mark and the expenses
2 Thom Browne incurred in order to make those sales. The burden
3 is on adidas to show by the preponderance of the credible
4 evidence the amount Thom Browne received from selling the
5 accused products, while the burden is on Thom Browne to show by
6 the preponderance of the credible evidence the expenses it
7 incurred in order to sell the accused products.

8 You will shortly retire to the jury room to begin your
9 deliberations. As soon as you get to the jury room, please
10 select one of your number as the foreperson to preside over
11 your deliberations and to serve as your spokesperson if you
12 need to communicate with the court.

13 You will be bringing with you into the jury room a
14 copy of my instructions of law and a verdict form on which to
15 record your verdict.

16 Let me pause just there and show you the verdict form.
17 You saw this during closing arguments with counsel. Let me
18 show you again. It's a simple one-page document. The first
19 question is whether on infringement you find Thom Browne liable
20 or not liable. If you find not liable, then you skip down to
21 question four. If you find liable, you answer two and three,
22 which are the amount of damages -- both actual damages and
23 profits, the two components of damages -- putting the amount
24 there. And then you go on to the final question, question
25 four, which is whether you find Thom Browne liable or not

N1CsADI4

Jury Charge

1 liable for dilution.

2 After you have reached your verdict and your
3 foreperson has signed and dated the verdict form, the
4 foreperson will fold it and seal it in this envelope very
5 cleverly marked verdict, and that will be brought to me here in
6 court. And I will not open it until all eight of you are back
7 here in the courtroom, and then we will open it and we will ask
8 each of you individually, after reading the verdict, whether
9 that is, in fact, your verdict. The reason we go through that
10 is to be absolutely sure we have your verdict as you have
11 decided.

12 So back to the instructions.

13 In addition, we will send into the jury room all of
14 the documentary and physical exhibits that were admitted into
15 evidence, along with an index so you can locate what you want.
16 If you want any of the testimony, that can also be provided in
17 either transcript or read-back form. But please remember that
18 it is not always easy to locate what you might want, so be as
19 specific as you possibly can be in requesting portions of
20 testimony. Also, if you want any of the videotapes replayed,
21 please let us know, and we will bring you back into court to
22 see the relevant videotape.

23 Any of your questions, in fact any communication with
24 the court, should be made to me in writing, signed by your
25 foreperson, and given to the marshal, who will be available

N1CsADI4

Jury Charge

1 outside the jury room throughout your deliberations. After
2 consulting with counsel, I will respond to any question or
3 request you have as promptly as possible, either in writing or
4 by having you return to the courtroom so that I can speak with
5 you in person.

6 You should not however tell me or anyone else how the
7 jury stands on any issue until you have reached your verdict
8 and recorded it on the verdict form.

9 Each of you must decide the case for yourself, after
10 consideration with your fellow jurors of the evidence in the
11 case, and your verdict must be unanimous. In deliberating,
12 bearing in mind that while each juror is entitled to his or her
13 opinion, you should exchange views with your fellow jurors.
14 That is the very purpose of jury deliberation -- to discuss and
15 consider the evidence, to listen to the arguments of fellow
16 jurors, to present your individual views, and to consult with
17 one other and reach a verdict based solely and wholly on the
18 evidence.

19 If after carefully listening and after carefully
20 considering all the evidence and the arguments of your fellow
21 jurors, you entertain a conscientious view that differs from
22 the others, you are not to yield your view simply because you
23 are outnumbered. On the other hand, you should not hesitate to
24 change or modify an earlier view that, after discussions with
25 your fellow jurors, now appears to you erroneous.

N1CsADI4

Jury Charge

1 In short, your verdict must reflect your individual
2 views and it must also be unanimous.

3 This completes my instructions on the law.

4 Now, all previous objections to the instructions are
5 deemed to have been made again at this time and are preserved.

6 Is there any reason counsel needs to approach the
7 sidebar?

8 MR. HENN: No, your Honor.

9 MR. MALDONADO: Yes, your Honor.

10 May we approach?

11 THE COURT: OK.

12 (At the sidebar)

13 MR. MALDONADO: I just wanted to put my early
14 objection on the record, I didn't say what it was. I want it
15 to be on the record to the verdict form.

16 THE COURT: What's your objection?

17 MR. MALDONADO: My objection was that the defendant
18 believes that the verdict form should include separate verdict
19 questions as to each of the accused products.

20 THE COURT: OK. That objection is overruled.

21 MR. MALDONADO: Thank you.

22 (In open court)

23 THE COURT: Ladies and gentlemen, we're going to swear
24 in the marshal who will guard you throughout your
25 deliberations.

N1CsADI4

Jury Charge

1 If you haven't reached a verdict by 4:30, unless you
2 want to stay later, you should just go home and come back at
3 9:30 tomorrow, and your foreperson will be in charge that you
4 don't start your deliberations again until all eight of you are
5 back.

6 If you decide you want to stay later, you need to let
7 us know by four o'clock today, a half hour before 4:30, and we
8 can arrange for you to stay as late as seven o'clock, if you
9 wish.

10 I remind you that there is no magic to how long you
11 need to take. You can take five minutes for your verdict. You
12 can take five days for your verdict. But it all is up to you.

13 So we will swear in the marshal.

14 (Marshal sworn)

15 THE DEPUTY CLERK: Jurors, please follow the marshal
16 back into our jury room.

17 (Jury not present)

18 THE COURT: As soon as you can, my courtroom deputy
19 will take the exhibits into the jury room. She hasn't done any
20 other weightlifting today, so this will be a good opportunity.

21 In terms of counsel. While the jury is deliberating,
22 there always has to be at least one counsel from each side
23 present on this floor. You don't have to be in this room, but
24 you have to be on the 14th floor, and someone who can answer
25 any notes we receive. So that if we get a note, we can

N1CsADI6

1 promptly respond, we don't have to go searching for counsel
2 somewhere else.

3 Unless they ask to stay later, you can just
4 automatically leave at 4:30 and come back at 9:30 tomorrow. I
5 will let them know tomorrow, if they are still deliberating,
6 that you can take lunch from one to two, but otherwise you need
7 to be on this floor.

8 Anything else any counsel needs to raise with the
9 court?

10 MR. HENN: Not from the plaintiffs.

11 MR. MALDONADO: Nothing, your Honor.

12 Do you have other matters this afternoon?

13 Do you need us to clear out of the courtroom?

14 THE COURT: Pardon?

15 MR. MALDONADO: Do you have other matters?

16 Do you need us to clear out of the courtroom?

17 THE COURT: I have something. I don't think it's four
18 o'clock. Let me just check.

19 It's not until 4:30, so you can stay here. You can
20 admire the now no longer existing rack, or you can consider, as
21 my law clerk did, who is the sixth Marx Brothers, and the
22 answer was Karl Marx.

23 See you shortly.

24 (Recess pending verdict)

25 (Jury not present)

N1CsADI6

1 THE COURT: We have a verdict.

2 Let's bring in the jury.

3 THE DEPUTY CLERK: Marshal, please bring in the jury.

4 (Jury present).

5 Would the foreperson please rise?

6 THE COURT: I'm sorry. Everyone can be seated first.

7 Actually, you can be seated, too, because when I open
8 the verdict form in a minute, I will not comment on it because
9 the determination of the verdict is your job, not mine.

10 But I did want to take a moment, before I open it, to
11 compliment this jury. I thought you were a terrific jury. I
12 saw you very carefully observing the witnesses, taking notes.
13 I have another trademark case beginning January 30. If you
14 wouldn't mind ...

15 Anyway, in all seriousness, you are now excused for
16 four years for your service.

17 OK. Now the foreperson will rise and I will open the
18 verdict.

19 All right. The verdict is in proper form.

20 Mr. Foreperson, on adidas' claim for trademark
21 infringement, does the jury find the defendant Thom Browne;
22 liable or not liable?

23 THE JURY: Not liable.

24 THE COURT: On adidas' claim for trademark dilution,
25 does the jury find the defendant Thom Browne; liable or not

N1CsADI6

1 liable?

2 THE JURY: Not liable.

3 THE COURT: Very good. Please hand it back.

4 Excuse me. I don't want any talking.

5 Please hand the verdict form to my courtroom deputy.

6 So, Juror No. 1, is that your verdict?

7 JUROR NO. 1: Yes.

8 THE COURT: Juror No. 2, is that your verdict?

9 JUROR NO. 2: Yes.

10 THE COURT: Juror No. 3, is that your verdict?

11 JUROR NO. 3: Yes.

12 THE COURT: Juror No. 4, is that your verdict?

13 JUROR NO. 4: Yes.

14 THE COURT: Juror No. 5, is that your verdict?

15 JUROR NO. 5: Yes.

16 THE COURT: Juror No. 6, is that your verdict?

17 JUROR NO. 6: Yes.

18 THE COURT: Juror No. 7, is that your verdict?

19 JUROR NO. 7: Yes.

20 THE COURT: Juror No. 8, is that your verdict?

21 JUROR NO. 8: Yes.

22 THE COURT: Juror No. 9, is that your verdict?

23 JUROR NO. 9: Yes.

24 THE COURT: Juror No. 10, is that your verdict?

25 JUROR NO. 10: Yes.

N1CsADI6

1 THE COURT: Juror No. 11, is that your verdict?

2 JUROR NO. 11: Yes.

3 THE COURT: Juror No. 12, is that your verdict?

4 JUROR NO. 12: Yes.

5 THE COURT: Juror polled. Jury unanimous.

6 Again, thank you so much for your excellent jury
7 service, and you are now excused.

8 Have a good weekend.

9 (Jury discharged)

10 All right. So this also obviates the need for the
11 court to deal with the issue of laches. The judgment will be
12 entered probably tomorrow.

13 Anything else we need to take up at this time?

14 Anything from plaintiff?

15 MR. FLEMMING: I don't believe so, your Honor.

16 THE COURT: Anything from defendant?

17 MR. MALDONADO: No, your Honor.

18 THE COURT: Very good. Thanks very much.

19 That concludes this proceeding.

20 (Adjourned)

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